112-717

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 133.

OTIS A. THAYER AND WILLIAM T. THAYER, APPELLANTS,

vs.

THE LIFE ASSOCIATION OF AMERICA, WILLIAM S. RELFE, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, AND EDWARD B. KNIGHT, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED OCTOBER 19, 1881.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 THE UNITED STATES OF AMERICA, }
District of West Virginia, } *To wit:*

At a circuit court of the United States, for the fourth judicial circuit, in and for the district of West Virginia, continued and held at the city of Parkersburg, on Thursday, the 10th day of June, A. D. 1880—present, the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, and, as such, associate judge of the circuit court of the United States for the district of West Virginia—among others, the following proceedings were had:

OTIS A. THAYER & WILLIAM T. THAYER }
vs. } In Equity.
THE LIFE ASSOCIATION OF AMERICA, and others. }

This day came the defendants, The Life Association of America, and William A. Relfe, superintendant, &c., by R. S. Barr, their solicitor, and presented to the court an attested record in the above cause from the circuit court of Kanawha county, and the order of removal made therein, and upon motion of said defendants, by their solicitor, it is ordered that said record be filed, and that said cause be docketed in this court for further proceedings, to be
2 had therein, and thereupon the complainants, by their solicitor, appeared and moved the court to remand the said cause to said circuit court of Kanawha county, the hearing whereof is continued to a future day.

And the said defendants, by their solicitor, moved the court to dis-olve the injunction granted in this cause by the circuit court of Kanawha county, the hearing whereof is continued to a future day.

The record referred to in the foregoing order is in the words and figures following, to wit:

STATE OF WEST VIRGINIA, *ss:*

O. A. & W. T. THAYER }
vs } In Chancery.
LIFE ASSOCIATION OF AMERICA *et als.* }

Pleas before the Judge of the Circuit Court of Kanawha County, on the 17th day of May, 1880, and in the 17th year of the State.

Be it remembered that heretofore, to wit, on the 22d day of April, 1880, came Otis A Thayer and William T. Thayer, by their counsel, filed their bill of complaint and exhibits in chancery against The Life Association of America, William S. Relfe, superintendant of the department of insurance of the State of Mis-
3 souri, and Edward B. Knight, trustee, in the clerk's office of the circuit court of Kanawha county; which bill and exhibits and an order of injunction endorsed on said bill are in the following words, to wit:

Bill of Complaint.

To the Honorable Joseph Smith, judge of the Kanawha circuit court, W. Va.

The complainants complain and say that the Life Association of America is a corporation created by the laws of the State of Missouri, doing business in said State. In the year 1871 said corporation had an agent in the county of Kanawha soliciting policies for life assurance; that said agent represented that it was the intention and scheme of his company to lend and invest in loans all the money received for premiums in the county where the premiums were obtained, and that the policyholders should have the refusal of said loans. By reason of these representations each of the complainants took and there was actually issued to each of them a life policy by said association for the sum of ten thousand (10,000) dollars.

Immediately after the complainants obtained a loan from said company of three thousand (3,000) dollars, and executed a deed
4 of trust, dated 22d August, 1872, upon a valuable property known as the South Side Foundery, situated in Kanawha county, West Virginia, to secure said loan. Complainants have made sum-ary payments on said loan, as follows:

1873, February 22d	$150
" August 22d	150
1874, February 22d	150
" August 22d	150
1875, February 22d	150
" August 22d	150
1876, February 22d	150
" August 22d	150
1877, February 22d	150
" August 22d	150
1878, February 22d	150
" August 22d	150
1879, February 22d	150
" August 22d	150

An office copy of said trust deed is here filed as a part of this bill, marked Exhibit No. 1.

The complainant William also made the following payments on his policy of life insurance:

1874, May 4th	$137 44
" November 4th	137 44
1872, May 4th	137 44
" November 4th	137 44
1873, May 4th	137 44

5 The complainant Otis made the following payments on his life policy:

1871, June 3	$116 13
" November 11	116 13
1872, May 4	116 13
" November 4	116 13
1873, May 4	116 13

Receipts for a portion of said payments are here filed, marked Exhibits Nos. 2, 3, 4, 5, 6, 7, 8.

On the 7th day of September, 1873, the complainant William exchanged his policy therefor, taking from said association for a paid-up policy for $748, and the complainant Otis exchanged his old policy for a paid-up policy for $642; said last named original policies are here filed as Exhibits Nos. 9 and 10.

On the 10th of November, 1879, the (State) circuit court of St. Louis, Missouri, dissolved the said corporation, and placed its assets in the hands of William S. Relfe, superintendent of the insurance department of the State of Missouri, for liquidation, as will appear by a letter of William S. Relfe, superintendent, to O. A. Thayer, dated 10th December, 1879, heretofore filed as Exhibit No. 11.

On the 18th of March, 1880, Edward B. Knight, trustee in said deed of trust, at the request of said Relfe, advertized the lands of the complainants for sale under and by virtue of the trust deed aforesaid, a copy of said advertisement is here filed, marked
6 Exhibit No. 12. Complainants allege that the action of said Kn-ght, trustee as aforesaid, is unjust and inequitable in this: The Life Association of America having insured the life of each of the complainants, and having become insolvent and its corporate life terminated, the fulfilment of the contract of assurance has become impossible, and the said association is liable to each of the complainants for the premiums paid by them respectively, with interest, and said premiums constitute an equitable set-off to the trust debt and loan made by said association to them.

An account made upon this basis, charging the complainants with the loan and interest, and crediting them with payments on loan and premiums paid with interest, will show that the trust debt is paid and extinguished, and that there is a balance due complainants of $91.63. A statement showing these results is here filed, marked Exhibit No. 13. The statement is made at six per cent., because that is the true rate of interest at the place of the contract and of the forum. And the superintendant only claims six per cent. in the advertisment, and for the additional reason that if ten per cent. is allowed on the debt it would also be claimed upon the payments and premiums, and the result would not be materially different.
7 The sale is also unjust and inequitable, because it was ordered by the officer of the circuit court of St. Louis and of the State of Missouri, who derives all his power and authority from a local court and a local statute, both of which are foreign to the State of West Virginia, and, also, has no privity of contract with either the grantees in said deed, the trustees, or the *cestrue que trust*, and whose power and authority is confined to the territory of the State whose statutes and courts vested him with such authority, and, also, has no

power or authority to institute suits, or to enforce collections in this State. The sale would also be unjust and inequitable, because it would compel complainants, citizens of West Virginia, to go to a foreign court to adjust equities that arose in West Virginia, and it would allow the trust fund to be removed outside of the jurisdiction of the courts of this State before the claims and equities of citizens of this State to said fund have been adjusted, settled, and paid.

The complainants therefore pray that The Life Association of America, Edward B. Knight, trustee, and William S. Relfe, superintendant, as aforesaid, be inhibited, restrained and enjoined from selling the lands mentioned and described in the trust deed from complainants to Edward B. Knight, dated 22d of August, 1872; that complainants be decreed their equitable offsets; that said trust deed be decreed to be extinguished and released; that they have a decree against said Life Association for the balance due them; and that they have general relief.

O. A. THAYER,
WM. T. THAYER,
By Counsel.

QUARRIER, *Sol.*

STATE OF WEST VIRGINIA, *Kanawha County,* } *To wit:*

William T. Thayer, one of the complainants named in the foregoing bill, being duly sworn, says: That the facts and allegations therein contained, so far as they are stated of his own knowledge, are true, and that so far as they are stated on information he believes them to be true.

W. T. THAYER.

Taken, sworn to, and subscribed before me, this 29 of March, 1880.

D. L. RUFFNER,
Notary Public, Kanawha County, West Va.

EXHIBIT No. 1.

This deed, made and entered into this twenty-second day of August, eighteen hundred and seventy-two, by and between
9 Otis A. Thayer and Annette, his wife, and William T. Thayer and Ann Eliza, his wife, parties of the first part, Edward B. Knight, of Kanawha county, West Virginia, party of the second part, and The Life Association of America, of St. Louis, in the State of Missouri, parties of the third part—

Witnesseth, that the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to be paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain and sell, convey and confirm unto said party of the second part the following real estate, lying and being situate in the county of Kanawha, State of West Virginia, and described as follows, to wit, a portion of that tract of land conveyed by Bushrod W. Creel, in his own right and as guardian of his infant

wards, Monroe and Wm. Creel, to Otis A. and William T. Thayer, parties of the first part, by deed dated November the 25th, 1870, and recorded November 26th, 1870, in the recorder's office of Kanawha county, book ——, page ——, to which said deed reference is here made for a more full and particular description of the land hereby conveyed.

The portion hereby conveyed is that upon which the foun-
10 dry and buildings connected therewith stand; includes five acres out of the seven; the portion not herein conveyed being the dwelling-house and yard and garden of Otis A. Thayer: To have and to hold the same, together with the appurtenances, to the said party of the second part, and to his successors in this trust, forever; in trust, however, for the following purpose:

Whereas the said Otis A. Thayer and William T. Thayer are justly indebted unto the party of the third part in and to the amount of $3,900, evidenced by seven promissory notes, all bearing date Charleston, West Virginia, August 22d, 1872; one for the sum of three thousand dollars, due and payable three years after date at the First National Bank of Charleston, West Va., and six other notes, each for one hundred and fifty dollars, all payable at the First National Bank of Charleston, W. Va., as follows: One payable six months after date, one payable twelve months after date, one payable eighteen months after date, one payable two years after date, one payable thirty months after date, and one payable three years after date, each and all the seven notes aforesaid being payable to the Life Association of America; and whereas, for the purpose of better securing said indebtedness, said parties of the first part covenant and agree with said party of the third part, and its assigns, that said
11 property is now clear and free from all general and special taxes and mechanics' liens; that the same have always been and hereafter shall be promptly paid: and, in case there should be any taxes now in arrear, or in case there shall be any fault in the punctual payment of the same, or the payment and release of said liens at any time hereafter, the said party of the third part, or its assigns, at its option, may pay same or redeem said property; and all amounts so expended, and all others sums and amounts expended under the provisions of this deed, together with ten per cent. per annum interest on all such expenditures, shall become debt due, additional to the indebtedness aforesaid, and secured in like manner by this deed of trust, and the said parties of the first part also covenant and agree with said party of the third part, its assigns and successors, that they will cause the buildings on said premises to be insured by such insurance company as may be selected by the party of the third part herein for a sum not less than ——— dollars, and that said party of the first part will pay all premiums for said insurance, and assign said policy of insurance to said party of the second part, as trustee under this trust, and that they, said
12 part of the first part, will continue said insurance in force and assigned as aforesaid until all of the notes hereinbefore mentioned shall have been fully paid off and discharged. Now, if said promissory notes shall be punctually paid at maturity, and if

the covenants aforesaid shall be well and truly kept, and all amounts expended as aforesaid shall be refunded and repaid to said party of the third part, or its assigns, by said parties of the first part, or their legal representatives, then the property hereinbefore conveyed shall be released at the cost of said parties of the first part; but if said promissory notes, or either or any of them, or any part of any one of them, shall be allowed to remain due and unpaid, or in case payment of any amount expended as aforesaid should not be made, or in case said covenants or any part thereof shall not be fully kept, then this deed shall remain in full force, and the said party of the second part shall be entitled to the im-ediate possession of said property and every part thereof; and said parties of the first part, and their heirs and assigns, after the time of such default, shall hold said premises as tenant only, from month to month, from and under said party of the second part, at the monthly rent of ——— dollars per
13 month, payable on the first day of every month after such default; and said party of the second part, or in case of the death or absence from said State of the party of the second part, then the sheriff of the county of Kanawha, in the State of West Virginia, acting as such for the time being, may proceed to sell the property hereinbefore described, or any part thereof, at public vendue, [to] the highest bidder, at Charleston, W. Va., on the terms and conditions prescribed by the laws of West Virginia in such cases, for cash, first giving twenty days' notice of the time, terms, and place of sale, and the property to be sold, by advertisement in some newspaper printed in the city of Charleston, and upon such sale shall execute and deliver a deed or deeds in fee-simple of the property sold to the purchaser thereof, (and all statements in every such deed contained in relation to the execution of the trust shall, in all courts of justice, be held to be *prima facie* true,) and receive the proceeds of sale, out of which shall be paid, first, the cost and expense of this trust; and next, all amounts expended as aforesaid for taxes and other purposes, with interest as above mentioned; and next, the amount that may remain unpaid on said notes hereinbefore described and the interest thereon, it being expressly stipulated herein that any failure
14 on the part of said parties of the first part to pay each and every one of said notes, every part thereof at the several times of their maturity respectively, or any failure on the part of the said parties of the first part, their heirs or assigns, to pay any taxes, general and special, as well as all premiums for insurance, as hereinbefore mentioned, or any failure on the part of the parties of the first part, their heirs or assigns, to keep and fulfill all of the covenants in this deed hereinbefore mentioned, shall cause all of said notes in this deed described to become and be considered due and payable for the purposes of this trust at the time of such default, and the remainder, if any, shall be paid to the said parties of the first part, or their legal representatives; and the said party of the second part covenants faithfully to perform and fulfill the trust herein created.

In testimony whereof, the parties have hereunto set their hands and seals, the day and year aforesaid.

O. A. THAYER. [SEAL.]
A. P. THAYER. [SEAL.]
W. T. THAYER. [SEAL.]
A. E. THAYER. [SEAL.]

STATE OF WEST VIRGINIA, }
County of Kanawha, } ss:

Be it remembered that on this twenty-fourth day of August, eighteen hundred and seventy-two, before the undersigned, a
15 notary public in and for the county aforesaid, in the State aforesaid, personally came O. A. Thayer and W. T. Thayer, whose names are signed to the above writing, or deed, dated August 22d, 1872, and acknowledged the same before me, in my county and State aforesaid, and they are personally known by me to be the same persons whose names are subscribed to the foregoing instrument of writing, as parties hereto, and they have acknowledged *and they have acknowledged* the same to be their act and deed for the purposes therein mentioned, and the said Annette P. Thayer, wife of O. A. Thayer, and Ann E. Thayer, wife of W. T. Thayer, having first been by me made acquainted with the contents of the foregoing conveyance, acknowledged, on examination, separate and apart from their said husbands, that they executed the same freely and without compulsion or under influence of their said husbands, and do not wish to retract it.

In testimony whereof, I have hereunto set my hand, this day and year last above written.

A. M. DOYLE,
Notary Public.

STATE OF WEST VIRGINIA, }
County of Kanawha, } ss:

I, the undersigned, recorder for said county, certify that the
16 foregoing instrument of writing, and certificate thereto annexed, was admitted to record in my office, of the 2d September, 1872, and is truly recorded in Trust Book No. 3, page 267, the same being stamped to the amount of four dollars. Witness my hand, the date aforesaid.

A. CUNNINGHAM,
Recorder.

Exhibit No. 2.

Statement of Settlement, May, 1872.

Renewal of Policy No. 12271.

Semi-Annual Premium.

Cash	
Current loan	
Cash, part of premium	$137 44
Old loan	
Current loan	
Less div'd	6 35
Total loan	
Int'st on loan, 8 per cent.	
Total cash to collect	$131 09

The Life Association of America hereby acknowledges having received the sum of one hundred & thirty-seven & $\frac{44}{100}$ dollars for payment in full of semi-annual premium (as per marginal statement) on policy No. 12271, on the life of Wm. T. Thayer, which continues said policy in force (each of its other conditions being duly observed) to Nov. 4th, A. D. 1872.

Not valid unless countersigned by A. M. Doyle, Charleston.

H. W. HOUGH,
Vice-President.
W. HAWLEY,
Secretary.

[Endorsed across the face in red ink:] Countersigned by A. M Doyle, treas., Charleston, W. Va., branch, this 25th day of May, 1872.

17

Exhibit No. 3.

Statement of Settlement of Nov., 1871.

Renewal of Policy No. 12271.

Semi-Annual Premium.

Cash	137 44
Current loan	
To collect:	
Cash, part of premium	137 44
Old loan	
Current loan	
Less div'd	
Int. on loan, at 8 per cent.	
Total cash [to] collect	$137 44

The Life Association of America hereby acknowledges having received the sum of one hundred & thirty-seven & $\frac{44}{100}$ dollars for payment in full of semi-annual premium (as per marginal statement) on policy No. 12271, on the life of W. T. Thayer, which continues said policy in force (each of its other conditions having been duly observed) to May 4th, A. D. 1872.

Not valid unless countersigned by .....

H. W. HOUGH,
Vice-President.
W. HAWLEY,
Secretary.

[Endorsed across the face in red ink:] Countersigned by A. M. Doyle, treas., Charleston, W. Va., branch, this 11th day of November, 1871.

Exhibit No. 4.

Trust Receipts Accompanying Policy.

Amount of Policy, $10.00. Date of Policy, *May* 4, 1871.

The Life Association of America hereby acknowledges having received the sum of one hundred and thirty-seven $\frac{44}{100}$ dollars, being first semi annual payment on policy No. 12271, on the life of Wm. T. Thayer, which continues said policy in force until Nov. 4, 1871.

H. W. HOUGH,
Vice-President.
W. HAWLEY,
Secretary

Not valid unless countersigned by the agent who receives the money.

[Endorsed across the face in red ink:] Countersigned by A. M. Doyle, treas., Charleston, W. Va., branch, this 1st day of July, 1871.

18 EXHIBIT No. 5.

Statement of Settlement, Nov. 1872.

Renewal of Policy No. 12273.

½-Annual Premium.

Cash / Current loan } $ ------

To collect:

Cash, part of premium	$116 13
Old loan	
Current loan	
Div'd, $5.60, held in trust	
Total loan	
Int. on same *to* 8 per cent.	
Total cash to collect	$116 13

The Life Association of America hereby acknowledges having received the sum of one hundred and sixteen $\frac{13}{100}$ dollars for payment in full of semi-annual premium (as per marginal statement) on policy No. 12273, on the life of O. A. Thayer, which continues said policy in force (each of its other conditions having been observed) to May 4th, A. D. 1873.

Not valid unless countersigned by John C. Carr, treas.

H. W. HOUGH,
Vice-President.
W. HAWLEY,
Secretary.

[Endorsed across face in red ink:] Countersigned by John C. Carr, treas., this 7th day of December, 1872.

EXHIBIT No. 6.

Statement of Settlement of May, 1872.

Renewal of Policy No. 12273.

Semi-Annual Premium.

Cash / Current loan } $ ------

To collect:

Cash, part of premium	$116 13
Old loan	
Current loan	
Div., $5.60, held in trust	
Total loan	
Interest on loan, at 8 per cent.	
Total cash to collect	$116 13

The Life Association of America hereby acknowledges having received the sum of one hundred and sixteen & $\frac{13}{100}$ dollars for payment in full of semi-annual premium (as per marginal statement) on policy No. 12273, on the life of Otis A. Thayer, which continues said policy in force (each of its other conditions having been observed) to Nov. 4th, A. D. 1872.

Not valid unless countersigned by A. M. Doyle, treas., Charleston branch.

H. W. HOUGH,
Vice-President.
W. HAWLEY,
Secretary.

[Endorsed across face in red ink:] Countersigned by A. M. Doyle, treas., Charleston, W. V., branch, this 6th day of June, 1872.

19 EXHIBIT No. 7.

Statement of Settlement, Nov., 1871.

Renewal of Policy No. 12273.

Semi-Annual Premium.

Cash, 116 13 / Current loan } $ _____

To collect:

Cash, part of premium	$116 13
Old Loan	
Cur'nt loan	
Less div'd	
Total loan	
Int. on loan, at 8 per cent.	
Total cash to collect	$116 13

The Life Association of America hereby acknowledges having received the sum of one hundred and sixteen $\frac{13}{100}$ dollars for payment in full of semi annual premium (as per marginal statement) on policy No. 12273, on the life of O. A. Thayer, which continues said policy in force (each of its other conditions having been duly observed) to May 4th, A. D. 1872.

Not valid unless countersigned by _____

W. H. HOUGH,
Vice-President.
W. HAWLEY,
Secretary.

[Endorsed across face in red ink:] Countersigned by A. M. Doyle, treas., Charleston, W. Va., branch, this 11th day of Nov. 1871.

EXHIBIT No. 8.

Statement of Settlement, Nov., 1872.

Renewal of Policy No. 12271.

½-Annual Premium.

Cash / Current loan } $ _____

To collect:

Cash, part of premium	$137 44
Old loan	
Current loan	6 35
Less div'd	
Total loan	
Int. on loan, at 8 per cent.	
Total cash to collect	$131 09

The Life Association of America hereby acknowledges having received the sum of one hundred and thirty-seven and $\frac{44}{100}$ dollars for payment in full of semi-annual premium (as per marginal statement) on policy No. 12271, on the life of W. T. Thayer, which continues said policy in force (each of its other conditions having been duly observed) to May 4th, A. D. 1873.

Not valid unless countersigned by John C. Carr, treas.

H. W. HOUGH,
Vice-President.
W. HAWLEY,
Secretary.

[Endorsed across face in red ink:] Countersigned by John C. Carr, treas., this 16 day of November, 1872.

20 EXHIBIT No. 9.

By this policy of insurance, No. 28357, The Life Association of America, for and on account of the considerations and conditions hereinafter set forth, does promise and agree to pay at its office, in the city of St. Louis, State of Missouri, the sum of seven hundred and fifty-eight dollars to Annie Eliza Thayer, in trust for herself and the children of the insured, or to the legal holders of this policy, sixty days after proof of the death, within fifty-eight years from the date hereof of William T. Thayer, of Charleston, West Virginia, hereinafter called the insured; if the insured shall survive said term of years, said sum shall then be paid to himself.

This policy is issued and accepted upon the following conditions, warranties, and agreements:

1st. That the answers, statements, declarations, and representations contained in or endorsed upon the application for this insurance, which application is hereby referred to and made a part of this contract, are warranted to be true in all respects; and that if this policy has been obtained by or through any fraud or misrepresentation of or concealment of any material fact, then this policy shall be absolutely null and void.

21 2d. That the sum of two hundred and fifty-six dollars and sixty cents is acknowledged as an indebtedness upon and a lien against this policy; that interest at the rate of eight per cent. per annum on said indebtedness (or on so much of the same as shall at any time be outstanding) shall be paid to said Life Association on or before the first day of September in each and every year during the continuance of this policy, or until such indebtedness shall have been cancelled by dividends, or otherwise extinguished; that if default be made in the payment of any interest, as aforesaid, when the same shall be due and payable, then this policy shall cease and determine and become and be wholly null and void, and that all said indebtedness outstanding at the maturity or other settlement of this policy shall be deducted from the amount payable by said association.

3d. That the *insured* may reside in any part of North America lying north of the thirty-sixth parallel of north latitude, and in any part of Europe lying north of the fortieth parallel of north latitude and west of the fortieth meridian of longitude east from Greenwich; he may (except from the first day of July to the first day of

22 December) reside, for a period not longer than ninety days in any one calendar year, in any part of the United States of America lying south of said thirty-sixth parallel of north latitude, and he may also pass as a passenger, by usual routes and means of conveyance, to and from any port or place within the foregoing limits; but if he shall, at any time during the continuance of this policy, pass beyon- or be without the foregoing limits, or shall be personally engaged in blasting, mining, or submarine operations, or in the manufacture or transportation of highly inflam-able or explosive substances, or as an employee in any capacity upon service on any sea, sound, inlet, bay, lake, river, or railroad, or if he shall enter, whether voluntarily or otherwise, into any military or naval service whatsoever (the militia, when not in actual service, alone excepted) without the consent of said Life Association previously given in writing, in each or either of the foregoing cases, or if he shall die by suicide or in consequence of his violation of any law, or if he shall be convicted of felony, then, and in each and every of the foregoing cases, this policy shall become and be null and void.

4th. If the *insured* shall die by suicide during the continu-

23 ance of this policy, then, on proof of such death, said Life Association will pay to the legal holder of this policy its net present value at the anniversary of the date of this policy last preceding such death, as computed by the American Experience Table of Mor-

tality, with four and one-half per cent. yearly interest, including in such present value the net premium last paid.

5th. That no assignment of this policy shall be valid unless made in writing, and unless a copy of the assignment be im-ediately after its execution forwarded to said Life Association, and that any claim against said association arising under this policy made by an assignee shall be subject to proof of interest.

6th. That in any and every case in which this policy shall mature or terminate, or cease and determine, or be and become null and void, all monies paid in respect of the same shall be forf-ited to said Life Association, and said association shall not be liable for the payment of the sum hereby insured, nor any part of the same, except as herein otherwise provided.

7th. That no monies due said Life Association on account of this policy shall be considered as paid unless a receipt be given
24 therefor, signed by the president and the secretary of said association, and that no waiver, or forfeiture, or change in, or addition, or qualification of any of the conditions of this policy shall be valid unless the same shall be executed in writing by the president and secretary of said association.

In testimony whereof, The Life Association of America has caused these presents to be signed by its president and secretary, and its corporate seal to be attached, at its office, in the city of St. Louis, State of Missouri, this first day of September, A. D. one thousand eight hundred and seventy-three.

[SEAL.] PENN COSTE, *Vice-President.*

J. S. PIERCE, *Secretary.*

The following is the endorsement on the back of the foregoing policy:

No. 28357. Dated Sept. 1st, 1873. Life insured, Wm. Thayer; beneficiary, wife and children. Life Association of America. Amount, $748; payable [at] death or in 58 years. Interest payable annually on the first day Sept. every year until the within indebtedness shall be cancelled. Form P. P. P. Edition Sept. 1st, 1873.

25 EXHIBIT No. 10.

By this policy of insurance, No. 28358, The Life Association of America, for and on account of the considerations and conditions hereinafter set forth, does promise and agree to pay at its office, in the city of St. Louis, State of Missouri, the sum of six hundred and forty-two dollars to Annette P. Thayer, in trust for herself and children of the insured, or to legal the holder of this policy, sixty days after proof of the death, within sixty-three years from the date thereof, of Otis A. Thayer, of Charleston, West Virginia, hereinafter called the *insured.*

If the insured shall survive said term of years, said sum shall then be paid to himself.

This policy is issued and accepted upon the following conditions, warranties and agreements:

1st. That the answers, statements, declarations and representa-

tions contained in or endorsed upon the application for this insurance, which application is hereby referred to and made a part of this contract, are warranted to be true in all respects; and that if this policy has been obtained by or through any fraud or misrepresentation of or concealment of any material act, then this
26 policy shall be absolutly null and void.

2d. That the sum of two hundred dollars and forty cents is acknowledged as indebtedness upon and lien against this policy; that interest at the rate of eight per cent. per annum on said indebtedness (or on so much of the same as shall at any time be outstanding) shall be paid to said Life Association on or before the first day of September in each and every year during the continuance of this policy, or until such indebtedness shall have been cancelled by dividends, or otherwise extinguished; that if default be made in the payment of any interest, as aforesaid, when the same shall be due and payable, then this policy shall cease and determine and become and be wholly null and void, and that all said indebtedness outstanding at the maturity or other settlement of this policy shall be deducted from the amount payable by said Association.

3d. That the insured may reside in any part of North America lying north of the thirty-sixth paral-el of north latitude, and in any part of Europe lying north of the fortieth paral-el of north
27 latitude and east of the fortieth meridian of longitude east from Greenwich; he may (except from the 1st day of July to the 1st day of December) reside, for a period not longer than ninety days in any one calendar year, in any part of the United States of America lying south of said thirty-sixth paral-el of north latitude, and he may also pass as a passenger, by usual routes and means of conveyance, to and from any port or place within the foregoing limits; but if he shall, at any time during the continuance of this policy, pass beyond or being without the foregoing limits, or shall be personally engaged in blasting, mining, or submarine operations, or in the manufacture or transportation of highly inflam-able or explosive substances, or as an employee in any capacity upon service on any sea, sound, inlet, bay, lake, river, or railroad, or if he shall enter, whether voluntarily or otherwise, into any military or naval service whatsoever (the militia, when not in actual service, alone excepted) without the consent of said Life Association previously given in writing, in each or either of the foregoing cases, or if he shall die by suicide or in consequence of his violation of any law, or if he shall be convicted of felony, then, in each and every of the foreging cases, this policy shall become and be null and void.

28 4th. If the insured shall die by suicide during the continuance of this policy, then, on proof of such death, said Life Association will pay to the legal holders of this policy its net present value at the anniversary of the date of this policy last preceding such death, as computed by the American Experience Table of Mortality, with four and one-half per cent. yearly interest, including in such net present value the net premium last paid.

5th. That no assignment of this policy shall be valid unless made in writing, and unless a copy of the assignment be im-ediately after

its execution forwarded to said Life Association, and that any claim against said association arising under this policy made by an assignee shall be subject to proof of interest.

6th. That in any and every case in which this policy shall mature or terminate, or cease and determine, or be and become null and void, all moneys paid in respect of the same shall be forfeited to said Life Association, and said association shall not be liable for the payment of the sum hereby insured, nor of any part of the same, except as herein otherwise provided.

29 7th. That no moneys due said Life Association on account of this policy shall be considered as paid unless a receipt be given therefor, signed by the president and secretary of said association, and that no waiver of forfeiture, or change in, or addition to, or qualification of this policy, shall be valid unless the same shall be executed in writing by the president and secretary of said association.

In witness whereof, The Life Association of America has caused these presents to be signed by its president and secretary, and its corporate seal to be attached, at its office, in the city of St. Louis, State of Missouri, this first day of September, A. D. one thousand eight hundred and seventy-three.

[SEAL.] BRENT COSTE, *President.*

J. S. PIERCE, *Secretary.*

The following is the endorsement upon the back of the foregoing policy:

No. 28358. Date, Sept. 1, 1873. Life insured, O. A. Thayer; beneficiary, wife and children. Life Association of America. Amount, $642; payable at death or in 63 years. Interest payable annually on the 1st day of September, every year, until the within indebtedness shall be cancelled. Form P. P. P. Edition of Sept. 1st, 1873.

30 EXHIBIT No. 11.

(761.) INSURANCE DEPARTMENT, STATE OF MISSOURI,
ST. LOUIS, *Dec. 10th*, 1879.

MR. O. A. THAYER, *Charleston, West Va.*

DEAR SIR: In the case of William S. Relfe, as superintendant of the insurance department of the State of Missouri, *vs.* The Life Association of America, in the circuit court of St. Louis, a decree was rendered Nov. 10, 1879, dissolving the said company, and placing it in my hands for liquidation. I am charged by law with the duty of making speedy collections of all debts due the said association, and amongst its assets I find your note over-due, secured by mortgage for $3,000, date- August 22d, 1872, with interest from Dr, 1879, at 10 per cent. It will be advisable for you to speedily make provision for the payment of this indebtedness, and I shall be obliged for your prompt attention to the matter. Advise me by letter what you propose to do.

Yours respectfully, WM. S. RELFE,
Superintendant.

31

Exhibit No. 12.

Trust Sale.

By virtue of a deed of trust, dated August 22, 1872, and recorded in the county court clerk's office of Kanawha county, West Virginia, in Trust Deed Book No. 3, page 267, executed by O. A. Thayer and wife, and Wm. T. Thayer and wife, to the undersigned trustee, to secure to the Life Association of America a debt therein described, I shall, on Saturday, the 25th day of April, 1880, proceed to sell, by way of public auction, to the highest bidder, at the front door of the court-house of said county of Kanawha, the property in said deed of trust conveyed, it being the property known as the South Side Foundry, situated in said county on the south side of the Kanawha river, im-ediately opposite the city of Charleston, and near the depot of the Chesapeake & Ohio railway, embodying a lot of land containing about five acres, and the foundry building and other buildings connected with the foundry erected thereon, and all other improvements and appurtenances connected therewith.

The sale will be made to satisfy only the original loan secured by said deed made by the said Life Association of America to said
32 Thayers, with legal interest, and credit will be given for all payments made on the same.

March 18th, 1880.

EDWARD B. KNIGHT, *Trustee.*

Exhibit No. 13.

O. A. & W. T. Thayer, in ac. with
Life Association of America.

Interest calculated at 6 per cent. to Feb'y 4th, 1880.

Dr.

1872, Aug. 22d.	Amount of note of this date		$3,000 00
	Interest		1,341 50
	Amount of pr. & int. to Feb'y 4, 1880		$4,341 50

Premium Policy, Cr.

1871, May	4.	Premium paid by W. T. Thayer	137.4–	int.,	72.16	=	219.60
" Nov.	4.	" " " "	137.44	"	68.03	=	205.47
1872, May	4.	" " " "	137.44	"	63.91	=	201.35
" Nov.	4.	" " " "	137.44	"	59.78	=	197.22
1873, May	4.	" " " "	137.44	"	55.66	=	193.10
							1,016.74

1871, June	3.	" " O. A. Thayer	116.13	int.,	60.39	=	176.52
" Nov.	11.	" " " "	116.13	"	57.37	=	173.50
1872, May	4.	" " " "	116.13	"	54.00	=	170.13
" Nov.	4.	" " " "	116.13	"	50.52	=	166.65
1873, May	4.	" " " "	116.13	"	47.03	=	163.16
							849.96

Interest Payments on Loan.

33

1873, Feb'y 22.	Amount paid by O. A. & W. T. Thayer,	$150.00;	int.,	62.57 =	212.57
" Aug. 22.	" " " " " "	150.00;	"	58.07 =	208.07
1874, Feb'y 22.	" " " " " "	150.00;	"	53.57 =	203.57
" Aug. 22.	" " " " " "	150.00;	"	49.07 =	199.07
1875, Feb'y 22.	" " " " " "	150.00;	"	44.57 =	194.57
" Aug. 22.	" " " " " "	150.00;	"	40.07 =	190.07
1876, Feb'y 22.	" " " " " "	150.00;	"	35.57 =	185.57
" Aug. 22.	" " " " " "	150.00;	"	31.07 =	181.07
1877, Feb'y 22.	" " " " " "	150.00;	"	26.57 =	176.57
" Aug. 22.	" " " " " "	150.00;	"	22.02 =	172.02
1878, Feb'y 22.	" " " " " "	150.00;	"	17.57 =	167.57
" Aug. 22.	" " " " " "	150.00;	"	13.07 =	163.07
1879, Feb'y 22.	" " " " " "	150.00;	"	8.57 =	158.57
" Aug. 22.	" " " " " "	150.00;	"	4.07 =	154.07
	Total int. payments				2,566.43
	" premium payments, W. T. T.				1,016.74
	" " " , O. A. T.				849.96
					$4,433.13
					$4,341.50
Am't of prin. & int. to Feb'y 4, 1880, (as per page 32)					$91.63

1880, Feb'y 4. Balance due O. A. & W. T. Thayer

Injunction.

Injunction awarded as prayed for in the bill, until further order, inhibiting, enjoining, and restraining the defendants from selling the lands mentioned and described in the trust deed from complainants to Edward B. Knight, dated 22d August, 1872. But this

34 injunction shall not take effect until bond be given before the clerk of the circuit court of Kanawha county, in the penalty of $500, conditioned as the law requires, and that plt's will abide by and perform such future orders, and decrees as may be hereafter entered in this cause.

Given under my hand, as judge of the eighth judicial circuit of the State of West Virginia, on this 2d day of April, 1880, at Fayette C. H.

To the clerk of the circuit court of Kanawha county, West Va.

H. A. HOLT.

And on another day, to wit, on the 22d day of April, 1880, the plaintiffs, by their attorney, sued out of the clerk's office aforesaid a writ of summons in this cause, which writ, and the order of injunction endorsed, and the return of service thereof are in the following words and figures, to wit:

Summons.

The State of West Virginia to the sheriff of Kanawha county, Greeting:

We command you that you summon The Life Association of America, William S. Relfe, superintendant of the insurance

35 department of the State of Missouri, and Edward B. Knight, trustee, if they be found within your bail-wick, to appear before the judge of our circuit court for the said county, at rules to be held in the clerk's office of said court, on the first Monday, in May next,

to answer a bill in chancery exhibited against them in our said court by Otis A. Thayer and William T. Thayer. And have then and there this writ.

Witness Thomas Swinburn, clerk of our said court, at the court-house of said county, the 22d day of April, 1880, and in the 17th year of the State.

THOMAS SWINBURN, *Clerk.*

Order of Injunction.

The within-named defendants, and each of them, are hereby inhibited, restrained, and enjoined from selling the lands mentioned and described in the trust deed from complainants to Edward B. Knight, dated 22d of August, 1872, Exhibit No. 1 filed with the bill, until the further order of the court.

Bond given as required by the order of the judge.

Teste: THOMAS SWINBURN, *Clerk*

Return.

36 And at rules held in the clerk's office of the circuit court of Kanawha county for the month of May, 1880:

Decree Nisi.

On motion of the plaintiffs by counsel, and the writ of summons issued in this cause being returned executed on the defendants and they failing to appear, it is ordered that the bill be taken *pro confesso* and set for hearing against them at the next rules, unless they shall appear, plead, answer, or demur thereto.

And now at this day, to wit, at a circuit court held in and for Kanawha county, at the court-house thereof, on the 17th day of May, 1880, the following order was made:

O. A. & W. T. THAYER
vs.
E. B. KNIGHT, Trustee, THE LIFE ASSOCIATION OF AMERICA, and W. S. RELFE, Superintendant. } In Chancery.

This day the defendants, The Life Association of America and Wm. S. Relfe, Superintendant, tendered their petition in this cause for the removal of the same to the United States circuit court for the fourth judicial circuit of the United States, sitting at Parkersburg, in West Virginia, in said district, as in such cases provided by act of the Congress of the United States, together with
37 the bond required by such act, which petition and bond are ordered to be filed.

And it appearing to the court that this is a cause properly removable under said act, it is therefore adjudged, ordered, and decreed that this cause be removed to said United States circuit court, sitting at Parkersburg, in West Virginia, in said district.

Petition.

O. A. & W. T. THAYER
vs.
LIFE ASSOCIATION OF AMERICA *et als.* } Petition for Removal.

To the Honorable Joseph Smith, judge of the circuit court of Kanawha county, West Virginia:

Your petitioners, The Life Association of America and William S. Relfe, superintendant of said Life Association of America, respectfully represent unto your honor and allege that there is now pending in your honor's said court a suit in equity, which was instituted since the last term of said court, wherein O. A. Thayer and W. T. Thayer are complainants and your petitioners and E. B. Knight, trustee, are defendants; that the said Knight, trustee, is merely a nominal party to said suit, and has no interest whatsoever in the controversy therein or in the event thereof, but said contro-
38 versy is wholly between the complainants in said suit and your petitioners; that the amount in dispute largely exceeds the sum of $500.00; that the complainants in said suit, at the time of the institution thereof, were, and ever since have been, and still are, citizens and inhabitants of the State of West Virginia; and your petitioner, William S. Relfe, sup't, then was, and ever since has been, and still is, a citizen and inhabitant of the State of Missouri; and your petitioner, The Life Association of America, then was, and ever since has been, and still is, a body corporate, created and organized by, under, and persuant to the laws of the State of Missouri, and existing and doing business in the said State of Missouri, and has its principal office and place of business in said State of Missouri, and is a corporation of said State.

Your petitioners, therefore, pray that the said cause may be removed from your honor's said court to the United States circuit court for the fourth judicial district, sitting in Parkersburg, in West Virginia, in said district, as is by act of Congres of the United States in such cases provided.

And, as in duty bound, &c.

THE LIFE ASSOCIATION OF AMERICA &
WM. S. RELFE, *Sup't*,
By SMITH AND KNIGHT, *Attorneys*.

39 *Bond.*

O. A. & WM. T. THAYER
vs.
LIFE ASSOCIATION OF AMERICA. } Bond for Removal.

Know all men by these presents, that we, E. B. Knight and C. P. Snyder, are held and firmly bound unto the United States of America in the just and full sum of five hundred dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, and our personal representatives, jointly, several-y, firmly by these presents, as witness our hands and seals, this —— day of May, 1880.

The condition of the above obligation is such, that whereas there

is now pending in the circuit court of Kanawha county, West Virginia, a certain suit in equity, wherein O. A. Thayer and W. T. Thayer are complainants and the Life Association of America and W. S. Relfe, sup't, *et al.*, are defendants; and the said Life Association of America and Relfe, sup't, have filed their petition in said cause, and made application to said circuit court for the removal of the same into the circuit court of the United States for the fourth judicial district, sitting at Parkersburg, in West Virginia, in said district:

40 Now, if the said petitioners shall enter in the said United States circuit court on the first day of the next session a copy of the record in said suit, and shall pay all costs and damages that may be awarded by said United States circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; else to remain in full force.

E. B. KNIGHT. [SEAL.]
C. P. SNYDER. [SEAL.]

STATE OF WEST VIRGINIA, *ss:*

I, Thomas Swinburn, clerk of the circuit court of Kanawha county, in the State of West Virginia, do certify that the foregoing is a full, true, and complete transcript of the record and proceedings in a chancery cause lately pending in said court, wherein O. A. & W. T. Thayer are complainants and The Life Association of America and William S. Relfe, superintendant, and E. B. Knight, trustee, are defendants.

Given under my hand, this —— day of May, 1880.

THOMAS SWINBURN, *Clerk.*

And on another day, to wit, on the 25th day of June, 1880, the following order was made:

41 O. A. & W. T. THAYER *vs.* THE LIFE ASSOCIATION OF AMERICA and others. } In Equity.

This day came the parties, by their solicitors, and the said Life Association of America and William S. Relfe, superintendant, &c., by leave had filed their demurrer to plaintiffs' bill; in which demurrer the plaintiffs join.

And thereupon the hearing upon said demurrer is ordered to proceed at once.

And on another day, to wit, on the 15th day of October, 1880, the following order was made and entered of record, to wit:

O. A. & W. T. THAYER *vs.* THE LIFE ASSOCIATION OF AMERICA and others. } In Equity.

This day came the parties, by their attorneys, and the court having maturely considered the questions arising upon the demurrer to the complainants' bill, filed by the defendant, doth sustain the said demurrer, and the injunction allowed by the State court in this cause

is hereby dissolved and annulled, and it is adjudged, ordered, and decreed that the plaintiffs do pay the costs of this suit accrued
42 up to this time.

And upon motion of the complainants, they have leave to file an amended bill herein within thirty days from this date; in default whereof, this suit shall stand dismissed at the costs of the complainant.

And on another day, to wit, on the 11th day of December, A. D. 1880, the following order was made and entered of record, to wit:

O. A. & W. T. THAYER
vs.
THE LIFE ASSOCIATION OF AMERICA and others. } In Equity.

On motion said complainants, an appeal is allowed them from the final decree entered in this cause dissolving the injunction dismissing the bill of complaint, to operate as a supersedeas upon the complainants' giving bond with good security, to be approved by one of the judges of this court, in the penal sum of one thousand dollars, conditioned as prescribed by law.

And on another day, to wit, on the —— day of December, 1880, a bond to act as a supersedeas was filed in the clerk's office
43 of this court, which bond, with the endorsements thereon, is in the words and figures following, of wit:

Bond.

Know all men by these presents, that we, O. A. Thayer and W. T. Thayer and Alexander M. Putney, are held and firmly bound unto The Life Association of America, William S. Relfe, superintendant of the department of insurance of the State of Missouri, and Edward B. Knight, trustee, in the full and just sum of one thousand dollars, to be paid to the said Life Association of America, William S. Relfe, superintendant of the department of insurance of the State of Missouri, and Edward B. Knight, trustee, they, and each of their certain attornies, executors, administrators, or assigns; to which payment, well and truly be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 27th day of December, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at a circuit court of the United States for the district of West Virginia, in a suit depending in said court, between the said Otis A. Thayer and William T. Thayer, complainants, and the said The Life Association of America, William S.
44 Relfe, superintendant, of the department of insurance of the State of Missouri, and Edward B. Knight, trustee, defendants, a final decree was rendered against the said complainants, and the said complainants having prosecuted an appeal from said final decree to the Supreme Court of the United States, having obtained said appeal and filed a copy thereof in the clerk's office of the said

court, to reverse the decree in the aforesaid suit, and a citation directed to the said The Life Association of America, William S. Relfe, superintendant of the department of insurance of Missouri, and Edward B. Knight, trustee, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Otis A. Thayer and William T. Thayer shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and virture.

O. A. THAYER. [SEAL.]
W. T. THAYER. [SEAL.]
ALEXANDER M. PUTNEY. [SEAL.]

Sealed and delivered in the presence of me, and at the same time, the surety, Alexander M. Putney, justified as to his sufficiency.

PETER FONTAINE,
Commissioner of the United States Court
for the District of West Virginia.

Approved.
J. J. JACKSON, *Dist. Judge.*
Dec. 28, 1880.

45 Endorsed: Filed in the clerk's office, this 28th day of Dec., 1880. L. B. Dellicker, clerk.

The citation referred to in the foregoing bond is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To The Life Association of America, William S. Relfe, superintendant of the department of insurance of the State of Missouri, and Edward B. Knight, trustee, Greeting:

Whereas Otis A. Thayer and William T. Thayer have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of West Virginia, made in favor of you, the said The Life Association of America, William S. Relfe, superintendant of the department of insurance of the State of Missouri, and Edward B. Knight, trustee, and has filed the security by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States Supreme Court, this 28th day of December, in the year of our Lord one thousand eight hundred & eighty.

[SEAL.] L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

16 I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true and complete transcript of the record in the case of O. A. & W. T. Thayer *vs.* The Life Association of America *et al.*, as it appears in the records and files of my office.

In testimony whereof, I hereunto set my hand and the seal of said court, at Parkersburg, in said district, this 23d day of February, 1881.

[SEAL.]

L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

Endorsed on cover: West Virginia C. C. U. S. No. 133. Otis A. Thayer and William T. Thayer, appellants, *vs.* The Life Association of America, Wm. S. Relfe, superintendent of the insurance department of the State of Missouri, and Edward B. Knight, trustee. Filed 19th October, 1881.

112-717

Supreme Court U. S.
FILED
DEC 4 1884
JAMES H. McKENNEY,
CLERK.

Supreme Court of the U. S.

OCTOBER TERM, 1884.

No. 133.

OTIS H. THAYER and WILLIAM T. THAYER,
Appellants,

vs.

THE LIFE ASSOCIATION OF AMERICA, WILLIAM S. RELFE, Superintendent of the Insurance Department of the State of Missouri, and EDWARD B. KNIGHT, *Trustee.*

CHARLES C. COLE,
J. HOLDSWORTH GORDON,
Counsel for Appellants.

Supreme Court of the U. S.

OCTOBER TERM, 1884.

No. 133.

OTIS H. THAYER and WILLIAM T. THAYER,
Appellants,

vs.

THE LIFE ASSOCIATION OF AMERICA, WILLIAM S. RELFE, Superintendent of the Insurance Department of the State of Missouri, and EDWARD B. KNIGHT, *Trustee.*

STATEMENT OF CASE.

This case comes before the Court on an Appeal from the circuit court of the United States for the district of West Virginia, to which court it was removed on petition from the circuit court of Kanawha county.

The petition of the appellant shows [page 2 of printed record,] that the defendant, The Life Association of America is a corporation created under the laws of Missouri doing business in said state. That in the year 1871, said corporation had an agent in the county of Kanawha, West Virginia, soliciting policies for life assurance; that said agent represented it to be the intention and scheme of his company to lend and invest in loans all the money received for premiums in the county where the premiums were obtained, and that policy holders should have the refusal of said loans.

By reason of these representations each of the complainants took, and there was actually issued to them, a life policy by said Association for the sum of ten thousand ($10,000) dollars, and that immediately after the issuance of said policies the complainants obtained a joint loan from said company of three thousand [$3,000] dollars, and executed a deed of trust [copy of deed page 4 of printed record] upon their joint valuable property situated in Kanawha County, West Virginia. The trustee under said trust being the defendant, Edward B. Knight. That the complainants made certain payments of interest on account of said loan amounting in all to some twenty-one hundred [$2,100] dollars [printed record page 2] and also made sundry payments on their policies of insurance [printed record pages 2 and 3]

That on the seventh of May 1873, the complainant William Thayer exchanged his original policy of insurance for a paid-up policy for $748.00 and the complainant Otis Thayer exchanged his original policy for a paid-up policy for $642.00

That on the 10th day of November A D. 1879 the circuit court of St. Louis, Missouri, dissolved the said cor-

poration, the defendant, on account of its insolvency, and placed its assets in the hands of the defendant William S. Relfe, superintendent of the insurance department of the state of Missouri. [See letter printed Record page 11.]

That on the 18th day of March, 1880, the defendant, Edward B. Knight, trustee in said deed of trust, at the request of said Relfe, advertised the lands of the complainants for sale under and by virtue of said trust deed [copy of adv't, Printed Record, p. 12.]

The complainants allege that the action of said Knight, trustee, is unjust and inequitable in this:

The Life Association of America having insured the life of each of the complainants, and having become insolvent and its corporate life terminated, the fulfilment of the contract of assurance has become impossible, and the said association is liable to each of the complainants for the premiums paid by them respectively, with interest, and the said premiums constitute an equitable set-off to the trust-debt and loan made by said association to them.

They further claim that an accounting on this basis, charging them with the loan and interest and crediting them with the payments on loan and premiums, will show the trust-debt paid and extinguished and the balance in favor of the complainants.

They further claim that the sale proposed would be unjust and inequitable because ordered by the officers of the circuit court of St. Louis and of the State of Missouri, who derives all his power and authority from a local court and a local statute, both of which are foreign to the state of West Virginia, and also has no priority of contract with either the grantees in said deed, the trustees,

or the *cestue-que-trust*, and whose power and authority is confined to the territory of the state whose statutes and courts vested him with such authority, and has no power to institute suits or to enforce collections in this state.

They further claim that the sale proposed would be unjust and inequitable, because it would compel the complainants citizens of West Virginia to go to a foreign court to adjust equities that arose in West Virginia, and it would allow the trust-fund to be removed outside of the jurisdiction of the courts of this state before the claims and equities of citizens of this state to said fund have been adjusted, settled and paid.

The complainants therefore pray that the Life Association of America, Edward B. Knight and William S. Relfe, superintendent, be inhibited, restrained and enjoined from selling the lands mentioned and described in the trust-deed; that complainants be decreed their equitable off-sets; that the trust-deed be decreed to be extinguished and released, and that they have a decree against the said Life Association for the balance due them. And that they have general relief. A temporary restraining order was passed by the state court.

The defendant Life Association, filed demurrer to the bill and issue was joined.

The cause was removed to the United States circuit court, and upon hearing, the demurrer was sustained and the injunction allowed by the state court dissolved, and annulled.

From that order an appeal is taken to this Court.

POINTS.

The injunction prayed for should have been granted during the pendency of the enquiry as to the rights of

plaintiffs and the defendant in the cause. Here was a question of complicated accounts. There was and is undeniably a claim or debt in favor of the appellants against the appellee. The amount due to either could only be ascertained upon an accounting, and the manifest injustice and inequity of a sale of the appellants valued estate for the payment of an unascertained amount is evident, and should be sufficient to enlist the aid of the chancellor in preventing the sale proposed until the settlement of the accounts at issue.

A court of equity will in many cases interfere by injunction, to preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decidid; and that without expressing and often without having the means of forming any opinion as to such rights.

Great Western Railway Co. *v.* Burmingham &c. Railway Co., 2 Phillips Ch. 597.

Where the respective rights of the parties are doubtful and the continuance of the act complained of will work permanent and substantial damage to the complainant, and the injury resulting to the other party from a temporary injunction and the consequent delay can cause no loss that cannot be fully compensated, and for that compensation he can have security, the court ought to grant a provisional injunction, pending the litigation, and until the rights of the parties are definitely established by a judgment in the cause.

Spear *v.* Cutter, 5, Barber 486.
Kelin *v.* West, 3 Greene, (N. J.,) Eq., 449.

If the rights of the parties can only be enforced by expensive litigation, and those rights can be more promptly

and efficiently asserted in equity, a stringent reason is offered for equitable interference in the form of an injunction.

Here is a dispute between two litigants one side claiming a certain amount to be due, this denied by the other and a counter claim asserted. What more consonant with equity in its true meaning, "Natural justice in the larger sense," than that one of the parties should be restrained until the rights of each are settled, from selling the property of the other to liquidate a disputed claim, impossible of ascertainment until hearing had ?

SECOND.

The claim of the appellants for equitable interference is well grounded. The policies and the loan may in equity be rightly regarded as one and the same transaction.

The policies were obtained directly with the object of securing the loan, the loan was held out as inducement for the policies. The utter inability, by reason of insolvency of the appellee, to enforce payment of the policies, should they become due by reason of death or attainment of age designated, makes the claim, based upon said policies, an equitable set-off against the demand of the appellees for the payment of the loan made as part consideration of the issuance of the policies.

There can be no doubt that the policies have a value of some kind, even if the court is not disposed to favorably regard the basis of accounting, as proposed by the appellants. And they claim to set off this present value against the appellants' claim, and the present value can only be ascertained by an account had, to which they are entitled before sale.

Where cross-indebtedness arises out of mutual dealings, equity will always interpose to set off one debt against the other, and adjudge balance to the sum equitably due.

Insolvency, ordinarily, affords a ground for set-off in equity.

Ainsley *v.* Boynton, 2 Barb. 258.
Smith *v.* Felton, 43 N. Y. 419.
Field *v.* Oliver, 43 Mo. 200.
Brewer *v.* Norcross, 17 (N. J.) Eq. 219.

Here the ground of relief arises from the peculiar circumstances or natural justice of the case growing out of the mutual transactions of the parties; which would require the interposition of a Court of Equity, and which a court of law could not regard.

Lockwood *v.* Beckwrit, 6 Mich. 168.
Black *v.* Whitall, 9 N. J., Eq., 572.
Raleigh *v.* Raleigh, 35 Ill. 512.

THIRD.

The court should not allow the property of appellants to be sold, and the fund arising from such sale to be removed beyond its jurisdiction, to a foreign state, thus exposing the appellants to the expense and inconvenience of following the same to another jurisdiction, there to set up and litigate their rights.

This is an equitable doctrine too well settled to need argument or authorities to sustain it.

CHARLES C. COLE,
J. HOLDSWORTH GORDON,
Counsel for Appellants.

112-717

DEC 4 1884
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

October Term, 1884.

No. 133.

OTIS A. THAYER AND WILLIAM T. THAYER,
APPELLANTS,

vs.

THE LIFE ASSOCIATION OF AMERICA, WILLIAM S. RELFE, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, AND EDWARD B. KNIGHT, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLEE.

SUPREME COURT OF THE UNITED STATES.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLEE.

I respectfully submit that the demurrer to the complainant's bill was properly sustained by the court below. Because:

1st. The bill fails to show any ground for claiming an equitable set-off against the mortgage debt, to the extent of the premiums paid by the complainants on the policies issued to them.

(*a.*) The bill shows the amount of premiums paid on the original policies, issued by the Association, on the life of complainants. Paid up policies were issued them, in lieu of the originals. [See Record p. 3.] This was in 1873. The bill was filed in 1880. The theory of the bill seems to be that by reason of the insolvency of the Company, the whole of the original premiums paid may be recovered back by way of set-off.

This can not be true for several reasons.

1. The original policies were surrendered by mutual agreement,

and a new contract of insurance substituted. The rights and liabilities of the parties are therefore to be determined by the terms of the paid up policies.

It will be borne in mind that the bill contains no charge of fraud in the substitution of one contract for the other. It seems therefore that the paid up policies alone, constitute the insurance contracts involved in this suit. It will be noticed that the only premiums paid for insurance, as shown by the bill, are on the *original* policies. There is however in the second clause of each of the paid up policies, a provision for a forfeiture of the policy. The bill does not show that any payment of interest was made on the indebtedness specified in said policies. The second and sixth clauses of said policies provide for a complete forfeiture.

I therefore insist that the premiums paid on the original policies constitutes *no claim* in any sense, against the association, and that the bill fails to make any case based upon the paid up policies. In order to base *any* claim upon them we must resort to a presumption, and not rely upon the pleading itself. The bill, I submit, fails to show any claim, constituting a subject of set-off against the debt secured by the deed of trust.

The bill shows that the affairs of the Association had been placed in the hands of the Insurance Department of the State of Missouri, by the order of a court of competent jurisdiction. [Record, p. 14.]—*Relfe vs. Rundle*, 13 *Otto* 222.

The bill shows that the Association was doing business in the State of West Virginia, having an agent there, when the loan was made and the policies issued.

In *Relfe vs. Rundle* this court has said that every corporation carries its charter wherever it goes * * * * * and that every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs, both in life and after dissolution.

The property of the corporation passed by operation of law, to the superintendent, for the uses declared by the 6047th section of the Revised Statutes of Missouri. If the theory of this bill be true, then the assets of the corporation, or a part thereof, will be applied in a different manner from that prescribed by law.

The complainants being affected with notice of this provision, it certainly estops them from now setting up this claim. All policy

holders necessarily accepted the policies and paid premiums thereon on the basis of this statute. To now permit this set-off, if any claim exists, would work injury and inequality in the distribution of a common fund.

I respectfully submit that the claim set up, ought not to be allowed, and for this reason the demurrer was properly sustained.

2. The second point made in the bill is apparently on the ground of usury under the Statutes of West Virginia.—*Code of West Virginia, Ch.* 96, *Sec.* 4.

The trustee was about to sell to satisfy the original loan with six per cent interest, and crediting all payments made. [See Record, p. 15.]

This is all that the bill claims on this point, and in absence of any allegation of dispute in relation to the original debt, or the credits thereon, or some intended fraud on the part of the trustee, there was no cause for litigation on the question of usury or payments.

This bill is not for discovery as may, in proper cases, be filed under Sec. 7 of Chatper 96 of the Code of West Virginia. No discovery is sought; no want of knowledge is alleged. So far as appears by the pleadings there is no controversy between the parties in relation to the amounts, nor any as to the basis of settlement of the interest account. Hence a Court of Equity had no question to determine between the parties.

3. The remaining allegation of the bill that Mr. Relfe, the superintendent, had no power to order a sale of the property or institute suits or force collections in West Virginia, is probably out of the case, by what this Court has decided in *Relfe vs. Rundle.* Believing that the point made has been decided already, I submit it without other comment.

4. All the parties interested were not before the Court.

The policies exhibited show that the wives and children of the complainants, respectively, were the beneficiaries. The litigation grows out of the issue of policies, now represented by the paid up policies. If the complainants can maintain this bill at all it is only on the theory of adjusting accounts growing out of this insurance. I respectfully suggest that these beneficiaries are certainly interested, for the policies are theirs. Complainants, by their bill, really ask that the whole of these insurance contracts be cancelled, and a settlement made so as to place the parties in the same posi-

tion they were in prior to the issuance of any policy. This is necessarily so, for if all premiums be paid back, the contracts must fall. The bill it would seem, therefore, attacks the property rights of the beneficiaries. Before this can be done the beneficiaries surely ought to be heard.

I respectfully insist that the decree of the court below is right and ought to be affirmed.

R. G. BARR,
Of Counsel for Appellee.

112-720

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 139.

THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, ET AL., PLAINTIFFS IN ERROR,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED OCTOBER 24, 1884

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 139.

THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, ET AL., PLAINTIFFS IN ERROR,

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1 District Court, Sixth Judicial District.

STATE OF MINNESOTA, *Blue Earth County:*

I hereby certify that I have carefully compared the within copy map with the original map, "Ex. A," attached to the original complaint in the action of The Winona & St. P. R. R. Co. ag'st The St. Paul & S. C. R. R. Co., and that the same is a true and correct transcript thereof, as appears from said original, which remains on file in my office, and of the whole thereof, except that the town of Sleepy Eye, and the flags and dates indicating surveys or location along the line of the "located line of the Winona & St. P. R. R." on this copy, are not on the said original.

Witness my hand and seal of office, at Mankato, this 31st day of January, A. D. 1880.

[SEAL.] WILLIAM C. DURKEE,
Clerk District Court, Blue Earth County, Minn.

Endorsed: "Certified copy of Ex. A." Filed Feb'y 2d, 1880.
SAM. H. NICHOLS,
Clerk Sup. C't, Minn.

(Here follows map, marked page 2.)

3 STATE OF MINNESOTA:

In Supreme Court, April Term, 1879.

State of Minnesota, District Court, Watonwan County.

THE WINONA AND SAINT PETER RAILROAD COMPANY
vs.
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles N. Bigelow.

The plaintiff complains and alleges:

First. That it is a corporation duly created and organized by and under the laws of the State of Minnesota, and that the defendant, The Saint Paul and Sioux City Railroad Company, claims to be a corporation created and organized by and under the laws of the State of Minnesota.

4 Second. That under and by virtue of an act of the Territory of Minnesota approved March 3rd, 1855, entitled "A bill to incorporate the Transit Railroad Company," the Transit Railroad Company was organized, incorporated, and created, with all the powers, rights, privileges, immunities, and franchises in said act of incorporation specified and granted.

Third. That by an act of Congress approved March 3rd, 1857, entitled "An act making a grant of lands to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroad in said State," the United States granted to the Territory of

Minnesota, for the purpose of aiding in the construction of railroads from Stillwater by way of Saint Paul and Saint Anthony to the foot of Big Stone lake and the mouth of Sioux Wood river, with a branch *via* St. Cloud and Crow Wing to the navigable waters of the
5 Red River of the North, at such point as the Legislature of said Territory might determine; from Saint Paul and from Saint Anthony *via* Minneapolis to a convenient point of junction west of the Mississippi river to the southern boundary of the Territory in the direction of the mouth of the Big Sioux river, with a branch *via* Faribault to the north line of the State of Iowa west of range sixteen; from Winona *via* Saint Peter to a point on the Big Sioux river south of the forty-fifth parallel of north latitude; also from La Crescent *via* Target lake up the valley of Root river to a point of junction with the last-mentioned road east of range seventeen, every alternate section of land designated by odd numbers for six sections in width on each side of said roads and branches; and it was in and by said act of Congress further provided and enacted that in case it should appear that the United States had, when the lines and routes of said roads and branches were definitely fixed, sold any sections, or parts thereof, or that the right of pre-emption
6 had attached to the same, then it should be lawful for any agent or agents, appointed by the Governor of said Territory or future State of Minnesota, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the right of pre-emption had attached as aforesaid, and that the lands thus granted and selected should be held by the said Territory or future State for the uses and purposes aforesaid; and it was in and by said act of Congress further provided and enacted that the lands to be located or selected as aforesaid should, in no case, be farther than fifteen miles from the lines of said roads and branches, and be selected for and on account of each of said roads and branches, and that the lands so granted and selected for and on account of said roads and branches, severally, should be exclu-
7 sively applied in the construction of that road for and on account of which such lands were granted, and that said lands should be applied to no other purpose whatever.

Fourth. That in and by an act of Congress, approved March 3d, 1865, entitled "An act extending the time for the completion of certain land-grant railroads in the State of Minnesota and Iowa, and for other purposes," it was provided and enacted that the quantity of lands granted by the act of Congress above referred to (approved March 3d, 1857) should be increased to ten sections per mile for each of said railroads and branches; and it was also in and by said act provided that the lands to be so located and selected should, in no case, be farther than twenty miles from the lines of said roads and branches, and that the said lands so granted should in all cases be indicated by the Secretary of the Interior.

Fifth. That in and by an act of Congress, approved March 12th,

1864, entitled "An act for a grant of lands to the State of
8 Iowa, in alternate sections, to aid in the construction of a
railroad in said State," there was granted to the State of Minnesota, to aid in the construction of a railroad from Saint Paul *via* Minneapolis to a convenient point of junction west of the Mississippi and the southern boundary of this State, in the direction of the mouth of the Big Sioux river, four additional alternate sections of land per mile, to be selected upon the same conditions, restrictions, and limitations as are contained in the act of Congress first above referred to (approved March 3rd, 1857).

Sixth. That in and by an act of Congress, approved July 13th, 1866, entitled "An act relating to lands granted to the State of Minnesota, to aid in constructing railroads," it was provided and enacted that whenever it should appear that the United States had sold or disposed of any lands granted to the Territory or State
of Minnesota for the purpose of aiding in the construc-
9 tion of railroads, after a definite location of the line of road
and before the withdrawal of said lands from sale at the proper local land office, the said State might, by its agent, select in lieu of the lands so sold or disposed of, from any lands of the United States subject to sale, being odd-numbered sections, within twenty miles of the line of the proper road, a quantity of land equal to that so sold or disposed of; and in and by said last-cited act it was provided that any lands theretofore granted to the Territory or State of Minnesota, in aid of the construction of railroads, should be, from time to time, certified to the State by the Secretary of the Interior; and it was in and by said act further provided that the lands granted to the State as aforesaid specifically lying in place should not be disposed of until the road should be completed through and coterminous with the same.

Seventh. That in and by an act of the Legislature of the Territory
of Minnesota, approved May 22, 1857, entitled "An act to ex-
10 ecute the trust created by an act of Congress entitled 'An act
making a grant of lands to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State, and granting certain lands to railroad companies therein named,'" the said Transit Railroad Company was authorized and empowered to survey, locate, construct, and perpetually to have, use, maintain, and operate the Transit railroad from the city of Winona, on the most direct and feasible route *via* Saint Peter, to the Big Sioux river, south of the 45th parallel of north latitude, and for the purpose of aiding in the construction of the said railroad, there was, by the last mentioned act of the Legislature of said Territory of Minnesota, granted to and conferred upon and vested in the said Transit Railroad Company all the interest and estate, present or prospective, of the said Territory or future State in or to any and
11 all the lands granted by the United States by the act of Con-
gress first above cited (approved March 3d, 1857,) to the said

trfnsit for the purpose of aiding in the construction of a railroad from Winona *via* St. Peter to the Big Sioux river.

Eighth. That the said Transit Railroad Company was one of the land-grant railroad companies referred to in the amendment of section ten of article nine of the constitution of the State of Minnesota, and it became entitled to and accepted the loan of the State credit provided for in said section ten of article nine aforesaid, subject to all the conditions and provisions of the said section of the constitution as amended as aforesaid, and subject to all the conditions and provisions of an act of the Legislature of the said Territory of Minnesota, entitled "An act concerning land-grant railroads," approved August 12th, A. D. 1858, and the bonds of the State to the amount of five hundred thousand dollars were issued and
12 delivered to the said Transit Railroad Company, under and in pursuance of, and on the terms and conditions specified and provided in the said section ten of the constitution, and in the said last-cited act of the Legislature of the said Territory.

And the plaintiff, for greater certainty, as a part of this its complaint, refers to each of the acts of Congress and of the Territory and State of Minnesota, referred to in this complaint, and to the whole and every part of each.

Ninth. That, to secure the payment of the principal and interest of the said State bonds delivered to said Transit Railroad Company as aforesaid, the said company issued and delivered to the State of Minnesota five hundred of its first mortgage bonds, of the denomination of one thousand dollars each, bearing interest at the rate of seven per cent. per annum, payable semi-annually, and granted, bargained, sold, transferred, and assigned to William Windom and J. H. Harmon, as trustees, to be by them held in trust, the entire railroad of the said Transit Railroad Company, built, or to be built, and all rights,
13 property, privileges, franchises, and immunities of the said Transit Railroad Company, of every nature and kind whatsoever, which was then owned by said company, or which should thereafter be acquired or owned by it, and all right, title, interest, and claim, either legal or equitable, which the said company had, or which it should afterwards acquire, in or to any lands under the act of Congress first above referred to (approved March 3rd, 1857), or under any of the acts of the Territory of Minnesota above referred to, and authorizing them, in case that the said Transit Railroad Company should fail to pay the principal or interest of said State bonds, or of said first mortgage bonds, as the same became payable, to enter upon and take possession of all and singular the rights, interest, property, franchises, and immunities granted in trust as aforesaid, and to sell and dispose of the same for the payment of the said principal and interest as in said trust deed provided, and to make, execute, and deliver to the purchaser or purchasers good and
14 sufficient deeds of conveyance of the same, and out of the moneys arising from such sale to pay the said principal and interest; and in case of neglect or refusal of the said trustee to enter upon and take possession of and sell said property, rights, franchises, &c., then the Governor of the State of Minnesota was in and

by said trust deed authorized to make, or cause to be made, such sale and foreclosure for the purpose aforesaid, which said trust deed was filed and recorded in the office of the secretary of State, and is hereby referred to for greater certainty.

Tenth. That the said Transit Railroad Company, long prior to January, 1860, had made default in the payment of the interest due on the State bonds delivered to it as aforesaid and on the said first mortgage bonds, and the said trustees, long prior and up to the said last-mentioned date, having neglected and refused to foreclose the said trust deed, or to sell the said property, lands, and franchises, as they were authorized and required to do as aforesaid, the Gover-
15 nor [of] the State of Minnesota did, as he was authorized by law, on the 23rd day of June, 1860, after having given due and legal notice thereof, cause to be sold at public auction, and bid in and purchased for and in the name of the State all the property, rights, privileges, and franchises pledged in said deed of trust, and did, on the sixteenth day of October, 1860, transfer and convey the same to the State of Minnesota.

Eleventh. That the State of Minnesota thereupon and thereby acquired and became the owner and possessed of all the rights, property, privileges, franchises, and immunities of any and every nature or kind which the said Transit Railroad Company has ever owned or possessed, and on the 10th day of March, A. D, 1862, the State of Minnesota, by an act approved that day, entitled "An act to facilitate the construction of a railroad from Winona westerly by way of Saint Peter," granted, transferred, and continued to William Lamb, S. S. L'Homedieu, John W. Kirk, Herman Gebhart,
16 H. C. Stimson, as a board of directors of the Winona and Saint Peter Railroad Company, and to their associates, sucessors, and assigns, by the name of The Winona and St. Peter Railroad Company, all the property, interest, corporate rights, privileges, and franchises of or which before had belonged to or been owned by the said Transit Railroad Company, to be held by the said Winona & St. Peter Railroad Company, for the purpose and on the terms and conditions in said act provided.

Twelfth. That on the 28th day of June A. D. 1862, the said Lamb, L'Homedieu, Kirk, and Gebhart, under and [in] pursuance of the act of the Legislature last above referred to, met at Winona and organized as a board of directors of the said Winona and Saint Peter Railroad Company, and thereupon and then and there accepted the said grant and the power and privileges thereby conferred, and assumed the duties imposed on them as such directors, and they thereupon entered upon their duties as such directors of said Winona and Saint Peter Railroad Company.

17 Thirteenth. That the plaintiff thereupon became, and ever since has been, entitled to and possessed of all the rights, benefits, privileges, franchises, and immunities which at any time before had been possessed by the said Transit Railroad Company under any of the laws of the Territory or State of Minnesota or of the United States, or which the State of Minnesota acquired by virtue of any of the proceedings aforesaid.

Fourteenth. That the plaintiff has surveyed, located, constructed, and completed, and within the time and in the manner specified and required by the laws of the United States and of the State and Territory of Minnesota, survey, locate, construct, and complete a line of railroad from Winona on the most direct and feasible route by way of Saint Peter to the Big Sioux river, south of the forty-fifth (45) parallel of north latitude. That the plaintiff did, on and prior to the ninth day of April, A. D. 1864, survey and definitely locate and stake out upon the face of the earth its line of railroad
18 from Winona, westerly, as far as the west line of range thirty-seven (37); and did, before the 12th day of November, A. D. 1872, construct and complete its line of railroad from Winona as far as said western line of range thirty-seven (37); and did, on or before the 12th day of November, 1866, definitely locate and stake out upon the ground its line of railroad from Winona to the Big Sioux river, south of the forty-fifth (45) parallel of north latitude; and did, prior to the last day of August, A. D. 1873, complete the construction of its entire line of road as aforesaid. That by an act of Congress, approved January 10th, 1873, entitled An act for the extension of time to the Winona and Saint Peter Railroad Company, was extended until the third day of September, A. D. 1873.

Fifteenth. That the plaintiff has in all respects conformed to and complied with the several acts of the Territory and State of Minnesota as to the building of the said railroad from Winona,
19 westerly, by way of Saint Peter to the Big Sioux river, and has in all respects complied with and conformed to the provisions, conditions, and requirements of the several acts of Congress granting lands to aid in the building of such road, and by the location and construction of its line of railroad as aforesaid it became and is entitled to the lands granted by the acts of Congress, above referred to, to aid in the building of said line of railroad.

Sixteenth. That the defendant, The Saint Paul and Sioux City Railroad Company, claims to be by its charter and by the laws of the Territory and State of Minnesota authorized to survey, locate, and build a line of railroad from Saint Paul and from Saint Anthony *via* Minneapolis to a point of junction at Shakopee to the south boundary of the Territory or State of Minnesota in the direction of the mouth of the Big Sioux river, and the said railroad company has built and put into operation a line of railroad from Saint
20 Paul to a point on the east line of range thirty-two, (at St. James,) and there is a line of railroad built from said Saint James on the east line of range thirty-two by the Sioux City and Saint Paul Railroad Company (a corporation organized under the laws of the State of Iowa) to a point on the south boundary of the State about forty miles east of the western line of said State.

Seventeenth. That the line of plaintiff's road, as marked on map, Exhibit "A," hereto attached, is correctly laid down and delineated, and said map correctly shows the sections and subdivisions of sections and the towns and ranges in and over which the plaintiff's said road is located and built, and the line of defendant's road to said Saint James is correctly laid down and delineated on said map, and the

line of the said Sioux City and Saint Paul railroad from said St. James southwesterly to the Iowa line as aforesaid, and the said map correctly shows the sections and subdivisions of sections and the towns and ranges in and over which the defendant's
21 road from Saint Paul to Saint James and the road of the Sioux City and Saint Paul Railroad Company west of Saint James are located and built.

Eighteenth. That said map Exhibit "A" truly and correctly lays down and represents the line of the plaintiff's road as the same was definitely located and staked out upon the face of the earth, and also the line as the same was constructed and built; and also the line of road of the defendant, The Saint Paul and Sioux City Railroad Company, as the same was actually constructed from Saint Paul to Saint James; and the line of road of the said Sioux City and St. Paul Railroad Company as the same was constructed from Saint James to the south line of the State as aforesaid; and said map also shows a preliminary line which was run by the Southern Minnesota Railroad Company, and which is now claimed by the defendant, The Saint Paul and Sioux [City] Railroad Company, as the line of the definite location of its road.

But this plaintiff avers and alleges, upon its information
22 and belief, that when said preliminary line was run by the said Southern Minnesota Railroad Company it was not intended by said last-named company as a definite location of the line of said railroad, but as a mere preliminary survey or line, and that said line was not, and never has been by any company, run or adopted as a definite location of said line or route, and that when the Southern Minnesota Railroad Company run said preliminary line it proposed and intended to extend and run the same far north of the southern boundary of the Territory and State of Minnesota to a point west of the western boundary of said State, on the Big Sioux river, and thence down the valley of said river, on the west side thereof, to its mouth.

Nineteenth. That said preliminary line was never extended to the Big Sioux river, or to any proposed terminal point of said railroad, but the same was abandoned, and the defendant, The Saint Paul and Sioux [City] Railroad Company never adopted said line or route.

And the plaintiff further avers that the said St. Paul and
23 Sioux City Railroad Company has never adopted or definitely located or fixed any other line or route except that on which its said railroad is constructed, and that no part of the Saint Paul and Sioux City Railroad was surveyed and staked out on the ground or definitely located or fixed between the west line of range thirty-one and west line of range forty until long after the line of the Winona and St. Peter railroad was definitely located and fixed and staked out upon the face of the earth all the way between said west line of range thirty-one and west line of range forty.

Twentieth. That the said map (Exhibit "A") correctly and truly shows the six-mile limits, ten-mile limits, and the fifteen-mile limits of the land granted to and for plaintiff's said line of railroad as said

limits have been adjusted, allowed, and fixed by the Secretary of the Interior.

Twenty-first. That the plaintiff has not varied its line of road from the line of location as laid down in said map (Exhibit "A") further or otherwise than the same became and was
24 necessary for engineering purposes, and without any change of its general course or route, or of its proposed western terminus. That before the plaintiff's said line of road was definitely located and fixed to any point between the western line of range thirty-one and the western line of range forty the right of preemption had attached and the United States had sold and disposed of so many of the lands lying within twenty miles of the said road that the remaining alternate sections within said limits failed and were insufficient to make up the number of acres to which the plaintiff was and became entitled under the act of Congress aforesaid by and on account of the building of its road to such point, and all the lands designated in Schedule "B," hereto attached, will fail to make up such deficiency; and the plaintiff avers, upon its information and belief, that the State of Minnesota has done and performed all the conditions on its part to be performed as a condition to its right to such lands to aid in building the plaintiff's road, and that
25 the plaintiff has done and performed all the conditions on its part to be done and performed as a condition to its right to such lands to aid in the building of and for and on account of the building of its said road.

Twenty-second. That by virtue of and for and on account of the building of the said line of railroad to the west line of range forty (40), the plaintiff has become, and is, entitled to, and in equity is the owner of, and has the title to, all the lands described in list hereto attached, marked Schedule "B," and which is made part of this complaint, and the defendant, The Saint Paul and Sioux City Railroad Company, claims some estate or interest therein adverse to the plaintiff, and that said lands are vacant and unoccupied.

Twenty-third. That the lands in Schedule "B," hereto attached, all those not included in Schedule "C" or "D," hereto attached, lie within the six-mile limits of the plaintiff's road, and all those included in Schedule C lie outside of the six and within the
26 ten-mile limits, and all those in Schedule D outside of the ten-mile limits of plaintiff's road, and none of said limits lie outside of or beyond the fifteen-mile limits of plaintiff's road, or within ten miles of the road of the defendant, The Saint Paul and Sioux City Railroad Company or of the road of said Sioux City and Saint Paul Railway Company, and all of those described in Schedule E lie more than fifteen, and those described in Schedule "F" more than twenty miles from the road of either of the last-named companies; and all of the lands in Schedule "B" which lie within fifteen miles of the road of either the last-named companies lie within the six-mile limits of plaintiff's road, and all of said lands which lie outside of the six-mile limits of plaintiff's road are more than fifteen miles from the road of either of the other companies named in this action.

Twenty-fourth. That neither the State of Minnesota nor the
27 St. Paul and Sioux City Railroad Company, nor any person for either, as plaintiff is informed and believes, selected for or on behalf of the last-named company any of the lands described or included in said Schedule "B," or claimed any of said lands as belonging either to the State or to the last-named company for or on account of the building of the said line of railroad by the said last-named company or any part thereof until long after the Winona and St. Peter Railroad Company had definitely located and staked out upon the face of the earth the entire length of its said line of railroad as aforesaid, nor until long after the six and fifteen mile limits of the land grant to aid in the building of the plaintiff's said road had been adjusted and fixed as aforesaid, nor until long after said lands had been withdrawn from market by the Secretary of the Interior, at the instance of the plaintiff, and to aid in building its line of road, nor did said State nor Saint Paul and Sioux
28 City Railroad Company, nor any person for either, select or cause to be selected any of the lands, Schedule "B," which lie outside of the plaintiff's six-mile limits, except the northeast quarter of section 17, town. 107, range 40, as belonging to either the State or the Saint Paul and Sioux City Railroad Company, for or on account of the building of the said line of railroad of the said Saint Paul and Sioux City Railroad Company, until long after the plaintiff had located and actually constructed the whole length of its entire line of railroad as aforesaid, and until after the plaintiff had for itself, and as the agent of and for the State of Minnesota, duly and legally selected and claimed said land as due and belonging to it or the State for its use, for and on account of the building of its said line of railroad as aforesaid.

Twenty-fifth. And plaintiff further alleges that it has been since long before March, 1857, and still is the rule and regulations of the General Land Office of the United States that in case of such conflicting grants the lands lying in place (within the six-mile limits) of one road and outside of the six-mile limits of the other
29 are legally awarded and belong to the former, and that land lying outside of the six-mile limits and within the fifteen-mile limits of both, or within the six-mile limits of both, are awarded and belong to both equally as tenants in common; and the lands granted to this State, as above alleged, to aid in building the roads of plaintiff and the defendant, The Saint Paul and Sioux City Railroad Company, have been adjusted and disposed of in accordance with the rules aforesaid.

That at different points between range twenty-six and range thirty-two (32) the plaintiff's line of road was definitely located and fixed upon the face of the earth prior to the running of the preliminary line of the Southern Minnesota railroad above referred to, at, through, and opposite such points, and at and opposite such points the said lines of road were not over twenty miles apart, and in some instances not over six miles apart, and in all such instances the defendant, The Saint Paul and Sioux City Railroad Company,
30 claimed and insisted that the lands granted to aid in the build-

ing of each and both of said lines of road should be awarded, apportioned, and disposed of — accordance with the rules and regulations aforesaid, and in pursuance of such rules and of the said request and demand of the said Saint Paul and Sioux City Railroad Company the lands lying within such conflicting limits were and have been awarded, apportioned, and disposed of, and the said last-named company has thus received and holds as against this plaintiff the undivided half of many thousand acres of such grant to which it would not otherwise have been entitled, and the whole of which would otherwise have fallen and been awarded to the plaintiff; wherefore the plaintiff claims and insists that it is inequitable, unjust, and fraudulent for the defendant, The Saint Paul and Sioux City Railroad Company, to claim any of the lands in Schedule "B," above referred to, estopped from claiming such lands, or any of them, as against the plaintiff.

31 Twenty-sixth. That prior to the making of any claim to or the selection of any of the lands in Schedule B by or for the defendant, The Saint Paul and Sioux City Railroad Company, the Secretary of the Interior, at the instance and request of the Governor of the State of Minnesota and of the plaintiff, had withdrawn all said lands (east of range 38) from market for the benefit of and to aid in the building of plaintiff's road.

Twenty-seventh. That the lands described in Schedule "B," hereto attached, have been certified to the State of Minnesota by the Secretary of the Interior under and in pursuance of the provisions in the several acts of Congress above cited and referred to, and the legal title to said lands is now in the State, and the defendant, The Saint Paul and Sioux City Railroad Company, claims to be entitled to, and demands from the Governor of the State of Minnesota, a deed of the same, and the said Governor threatens, and, as the plaintiff verily believes, intends to deed and convey the same to said Saint Paul and Sioux City Railroad Company, and the plaintiff verily

32 believes the said Governor will deed and convey said lands to said last-named company, is by this court restrained and enjoined from applying for or receiving a deed thereof.

Twenty-eighth. That the said Saint Paul and Sioux City Railroad Company is heavily indebted, and its creditors numerous, and its property, including its interest, present or prospective, in any lands to be by it received from the State or from the United States, for or on account of its building of its said road, encumbered, mortgaged, and conveyed in trust to secure said debts, and that a deed or conveyance to it by the Governor of the land described in Schedule "B" would encumber, embarrass, and cast a cloud upon the title of this plaintiff, which would necessarily cause a multiplicity of suits and vexatious litigation, and would increase the number of parties to such litigation and the expenses thereof, and would injure the credit and greatly lessen the value of the lands and securities of the plaintiff, and would make irreparable injury to the plaintiff.

33 Twenty-ninth. That the line of the plaintiff's road was surveyed and definitely located west of range thirty-seven (37)

before or as rapidly as possible after Government survey of the public lands west of said line.

Thirtieth. (As amended November 23, 1875 under order of court, dated November 6, 1875.) That at a contest between this plaintiff and this defendant, The Saint Paul and Sioux City Railroad Company, for the lands in controversy in this suit, before the Secretary of the Interior, in the year 1873, the officers, agents, and attorneys of said defendant, viz., E. F. Drake, president; John B. Blass, attorney, and R. Blakely and —— Merriam, directors, represented, stated, and affirmed that it, said defendant, had located and constructed its road along and past the lands in controversy, and to the south line of this State, and that such location had been made long prior to the location and construction of the plaintiff's line of road past said lands; that such representations were made to and in the

34 presence of the Secretary of the Interior, and to and in presence of James H. Stewart, general superintendent; H. W. Lamberton, land commissioner, and William Mitchell, attorney of plaintiff; that the others and agents of the said defendant also caused to — made and filed in the General Land Office at Washington, prior to the said contest before the Secretary of the Interior, maps of construction of its line of road, which showed and represented that it had constructed its road to the south line of the State of Minnesota, and past the lands in controversy (but what particular officer or officers made such maps or caused them to be filed as aforesaid this plaintiff is ignorant); that the said Stewart, Lamberton, and Mitchell had the sole charge and conduct of the said contest on the part of this plaintiff before the Secretary of the Interior; and the said officers and agents of the plaintiff believed and relied and acted upon said representations and statements of the said defendant's officers and agents made orally and by the said maps as aforesaid, and thereupon and then and there tacitly assented

35 to their truth, and the Secretary of the Interior, as this plaintiff believes, also believed and relied upon such statements and representations made orally and by said maps, and decided the said contest in favor of said defendant on the ground of priority of the construction, as well as the priority of the location of its said line of road past said lands; that said representations, both oral and written, as to the building of the said defendant's line of road from east line of range thirty-two to the State line were false, and were made by the defendant's said officers and agents, knowing their falsity, with the intention to deceive and mislead the agents and attorneys of the plaintiff and the Secretary of the Interior, and such representations did mislead and deceive the Secretary of the Interior (as plaintiff believes,) and the said officers and agents of the plaintiff.

Thirty-first. That the defendant, George P. Wilson, is attorney general of the State of Minnesota, and as such is made defendant in this action; and the defendants, Thomas A. Scott, Charles Scheffer, William R. Marshall, and Horace Hall, as plaintiff is informed and believes, are mortgagees or trustees of the de-

36 fendant, The Saint Paul and Sioux City Railroad Company,

and as such claims some right to or estate or interest in or lien or claim upon the property, lands, and franchises of the said last named company.

Wherefore plaintiff prays judgnient—

One. That plaintiff is the owner and entitled to a deed and conveyance from the Governor of the State of Minnesota of each and every piece and parcel of land described in Schedule B, hereto attached; and that neither of the defendants, The Saint Paul and Sioux City Railroad Company, Thomas A. Scott, Charles Scheffer, William R. Marshall, or Horace Hall, has any right or title to or estate or interest in or claim or lien upon the said lands or any part or parcel thereof; and that each and every of them be forever barred from all claims to any estate or interest in or lien upon said lands or any of them.

37 Two. That the said defendant, The Saint Paul and Sioux City Railroad Company, its officers, agents, and servants, and each and every of them, be perpetually restrained by an injunction issuing out of this court from applying for or receiving or accepting from the Governor of the State of Minnesota a deed or conveyance of the lands in Schedule "B" hereto attached, or of any piece or parcel or part thereof; and that a preliminary injunction may forthwith issue out of and under the seal of this court restraining and enjoining, pending this action, and until final judgment therein, the said Saint Paul and Sioux City Railroad Company, its officers, agents, and servants, and each and every of them, from applying for, receiving, or accepting from the Governor of this State a deed or conveyence of any piece or parcel of the land described in the said Schedule "B," and for such other and further relief as may be just and equitable and to the court may seem proper.

(Signed) WILSON AND TAYLOR,

38 *Plaintiff's Attorneys.*

STATE OF MINNESOTA, } ss:
Winona County, }

H. W. Lamberton having been first duly sworn, doth depose and say: That he is, and for eight years last past has been, the land commissioner of the plaintiff in this action; that he has heard read the foregoing complaint, and knows the contents thereof, and that he is more familiar with the matters of fact therein stated than is any other officer of the plaintiff, and that he is familiar with, and has actual knowledge of such facts, and that the above complaint is true.

(Signed) H. W. LAMBERTON.

Sworn & subscribed before me, this sixteenth day of October, A. D. 1875.

[SEAL.] W. A. ALLEN,
Notary Public.

STATE OF MINNESOTA:

District Court, Watonwan County.

THE WINONA AND ST. PETER RAILROAD COMPANY

39 *vs.*

THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY, Thomas A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, and George P. Wilson.

Now come The Saint Paul and Sioux City Railroad Company, Thomas A. Scott, William R. Marshall, and Horace Hall, of the defendants above named, and for their joint and several separate answer to the last named complaint in said action (which was served Oct. 17, 1875, and as to paragraph 30, on Nov. 24, 1875,) admit and allege as follows:

One. They deny each and every statement, allegation, matter and thing, and each and every part thereof in said last amended complaint contained, except as hereinafter expressly admitted or qualified.

Two. They admit that the defendant, The Saint Paul and Sioux City Railroad Company, claims to be and alleges that it is a

40 corporation created, organized, and acting under and by virtue of the laws of the State of Minnesota. They admit the passages of the several acts of Congress and of the Territory and State of Minnesota, referred to in said last amended complaint, in paragraphs 2 to 7 thereof, both inclusive, but demand that said acts and each of them be produced on the trial of this action for greater certainty.

Three. They deny any knowledge or information sufficient to form a belief as to the number of the bonds issued by the State of Minnesota, referred to in paragraph 80 of said last amended complaint, or whether any delivery of any bonds was made as alleged, or otherwise, or whether any first mortgage bonds referred to in paragraph or division 9 of said last amended complaint, were issued or delivered as alleged, or otherwise.

Four. They admit the allegations, and each of them, contained in paragraph or division 10 of said last amended complaint, as therein set forth.

41 Fifth. They admit that the State of Minnesota acquired and became the owner, and possessed of all rights, property, privileges, franchises, and immunities of any and every nature or kind which the said Transit Railroad Company had ever owned or possessed, as alleged in paragraph or division 11 of said last amended complaint, and held the same without merger or extinguishment, and that the State of Minnesota did, on March 10th, 1862, pass the act entitled "An act to facilitate the construction of a railroad from Winona westerly by way of St. Peter," being the act referred to in said paragraph or division 11 of said last amended complaint, but deny that said act conferred upon the parties named therein as a board of directors, or in any associate or corporate capacity, any property, interest, rights, privileges, or franchises whatever, except

the right to organize as a board of directors, and thereafter have and exercise such powers as in said act set forth. They allege that in and by said act all the property, interests, rights, privileges,
42 and franchises, in said paragraph or division 11 of said last amended complaint set forth, passed to, and became vested in the said William Lamb, S. S. L'Homedieu, John W. Kirk, Herman Gebhard, and H. C. Stimson, in their individual capacity, and not otherwise, and to their personal representatives and assigns.

Sixth. They deny that said Lamb, L'Homedieu, Kirk, and Gebhard met and organized, as stated in paragraph or division 12 of said last amended complaint, and allege that said Kirk, L'Homedieu, and Gebhart met as directors under said act on the 17th day of May, 1862, and organized by appointing L'Homedieu aforesaid president *pro tempore* and said Kirk secretary *pro tempore*, both to act until the next meeting.

That on the 30th day of June, 1862, an adjourned directors' meeting of said board was held at Winona, at which said Kirk, L'Homedieu, and Lamb were present; that at said last-named meeting the said Stimson tendered his resignation as director aforesaid, and said resignation was accepted, and E. F. Drake was duly appointed
43 director to fill the vacancy; and that hereinafter, in the year 1862, said Drake was duly elected president and said Kirk secretary of said board, and entered upon the discharge of their duties as such.

Seventh. They deny any knowledge or information sufficient to form a belief (except as in this answer otherwise set forth) as to each and every allegation contained in paragraphs 14 and 15 of said last amended complaint, and each and every part thereof, whether as therein stated or otherwise.

Eighth. That as to the allegations contained in paragraph 16 of said last amended complaint these defendants admit and aver that the defendant, The St. Paul and Sioux City Railroad Company, claims to be, and was and is, authorized by its charter and by the laws of the Territory and State of Minnesota and of the United States to survey, locate, and build a line of railroad from Saint Paul and from Saint Anthony *via* Minneapolis to a point of junction at Shakopee to the southern boundary of the Territory or State of Minne-
44 sota, in the direction of the mouth of the Big Sioux river, and that said railroad company has built and put into operation said line of railroad, as hereinafter in this answer set forth, and they refer to the subsequent allegations of this answer for a full and complete statement of the rights, interests, and operations of said railroad company in the premises.

Ninth. They admit and aver that the lines of road claimed to be owned by said plaintiff, as marked in map Exhibit "A," attached to the original complaint in this action and referred to in said last amended complaint herein, and the notice attached to the copy thereof served on these defendants, are correctly laid down and delineated, and said map correctly shows the sections and subdivisions of sections and the towns and ranges on and over which said line is built; and that the line of defendant's said road is correctly laid

down on said map, and that said map correctly shows the
45 sections and subdivisions of sections and towns and ranges on and over which the defendant's said road is built.

That the said defendant's said line of road was definitely fixed at the times and in the manner and through the sections, towns, and ranges hereinafter set forth.

Tenth. They admit that said map Exhibit "A," referred to aforesaid in this answer, and paragraphs 17 and 18 of said last amended complaint truly and correctly lays down and represents the line of road which is claimed by said plaintiff in said paragraph 18 to have been located and staked out upon the face, and also the line of road of the defendant, The Saint Paul and Sioux City Railroad Company, as the same was actually constructed, but they deny that the said map shows a preliminary line and aver that the line of road referred to in said paragraph 18 as a preliminary line, was and is from the east side of range 32 to the west line of range 40, the line of definite location of a portion of the line of road of the defendant, the
46 Saint Paul and Sioux City Railroad Company, running from Saint Paul and Saint Anthony *via* Minneapolis to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux river, designated in the act of Congress approved March 3rd, 1867, and as the same was definitely fixed in the manner provided by law by said Southern Minnesota Railroad Company, as hereinafter set forth, and they allege that the facts in respect to the matters set forth and referred to in said paragraph are fully and truly hereinafter set forth.

They deny that said line was ever abandoned, as alleged in paragraph 19 of said last amended complaint, and aver that it was, and has always continued to be, the line of definite location of said road, and has been so regarded and treated by all departments of the Government in the adjustment of said land grant and in the
47 award of lands in that behalf to said defendant, as said plaintiff well knows.

That said line has always been regarded as the only line definitely fixing the route of that part of said road under said act of March, 3d, 1857, and was duly adopted by said Saint Paul and Sioux City Railroad Company, and no other line of definite location has been adopted or substituted therefor by said company or by said Sioux City and Saint Paul Railroad Company.

Eleventh. They deny, upon information and belief, each and every allegation, and each and every part thereof, contained in paragraph 21 of said last amended complaint, whether as therein stated or otherwise, and deny that said plaintiff is entitled to any land between said points which lie within the several limits of the road of the defendant, as hereinafter stated.

Twelfth. They deny that, for any cause or on any account whatever, the plaintiff has become, or is entitled, or in equity or otherwise is the owner of, all or any of the lands described or referred to
48 in paragraph 22 of said last amended complaint, whether as therein stated or otherwise.

They admit that the defendant, the St. Paul and Sioux City Railroad Company, claims an estate and interest in all and singular the said lands in Exhibit "B" described adverse to said plaintiff, and allege that the nature and extent of said estate and interest is hereinafter in this answer set forth.

Thirteenth. They aver that all of the lands described in the several schedules named in paragraph 23 of said last-amended complaint, and which are in controversy herein, lie within the limits of the said line of road of said defendant, as definitely fixed by and under said act of Congress of March 3, 1857, and said act of May 12, 1864, and as said limits have been laid down, established, and acted upon in the adjustment of said land grants by the Secretary of the Interior.

Fourteenth. They deny each and every allegation, and
49 each and every part thereof, contained in paragraph 24 of said last-amended complaint, whether as therein stated or otherwise.

15. They deny each and every allegation in paragraph 25 of said last-amended complaint, whether as therein stated or otherwise, except that they admit that the defendant, the St. Paul and Sioux City Railroad Company, has obtained, and now holds, a title to and interest in certain lands referred to in said paragragh 25; but they deny that these defendants, or either or any of them, is estopped by any cause from claiming all and singular the lands in Schedule "B," referred to in said paragraph 25, and allege that said St. Paul and Sioux City Railroad Company is entitled to receive, and ought to have received, all the lands referred to in said paragraph 25 instead of an undivided half thereof, as alleged in said last-amended complaint, and they refer to the subsequent allegations of
50 this answer for a full statement of matters in this behalf, and of the rights of said St. Paul and Sioux City Railroad Company in relation thereto.

16. They deny each and every allegation in paragraph 26 of said last amended complaint contained and alleged that none of said lands were withdrawn from market prior to the definite location of the road of said St. Paul and Sioux City Railroad Company, as hereinafter set forth.

That no withdrawal from market at request of said plaintiff, or for its benefit, subsequent to such definite location of said road, could change or affect the rights of said St. Paul and Sioux City Railroad Company, in respect to said lands, or any part thereof.

17. They admit the allegation contained in paragraph 27, said last amended complaint, but allege that the same do not set forth the whole truth in the premises, and they refer to the subse-
51 quent allegations of this answer for a full and correct statement of the facts in that behalf.

18. They allege that the facts in reference to the matters which are referred to and attempted to be set forth in paragraph 28 of said last amended complaint, so far as the same are deemed material, are fully and truly hereinafter in this answer set forth. They deny that the issuance of a deed by the governor of the State of the land described

in said Exhibit "B" to said Saint Paul and Sioux City Railroad would encumber, embarrass, or cast any cloud upon any title of said plaintiff, or would, necessarily or otherwise, cause multiplicity of suits, or any suits or vexatious litigation would increase the number of parties to any litigation or injure the credit or lessen the value of any lands or securities of said plaintiff, or work irreparable or any injury to said plaintiff; but, on the contrary, they allege that the action is prematurely brought, and cannot, for that reason, be maintained. That the legal title to said lands is still in
52 the State, and that the pretended claim of said plaintiff to said lands can only be litigated by the courts of this State after the legal title to said lands has passed from said State to said defendant, The Saint Paul and Sioux City Railroad Company, and when all parties holding or claiming title thereto can be brought into court and their rights considered and determined.

19. And referring to paragraph 28 of said last amended complaint, the defendants, Thomas A. Scott, William R. Marshall, and Horace Hall, each severally deny that they, or either of them, have or claim any interest in or lien upon any of the lands, property, or franchises of the defendant, The Saint Paul and Sioux City Railroad Company, as far as the same are involved in or sought to be affected by this suit.

That the facts in reference to the interest of the said Charles Scheffer in the premises are as follows, and not otherwise: That, on or about the first day of January, A. D. 1873, the defendant,
53 The Saint Paul and Sioux City Railroad Company, entered into and executed in due form an agreement with the defendant, the said Charles Scheffer, as trustee, by the terms of which one hundred thousand acres of land of said company, with other property, were sold and conveyed to said Charles Scheffer, as trustee, to secure an indebtedness of four hundred thousand dollars, upon the terms and conditions in said agreement set forth. That the lands in controversy in this suit are the same lands in part which are included in and covered by said agreement, and have been so conveyed in trust for the purposes aforesaid in good faith, and the owners and holders of said stock in said agreement named have received the same and paid therefor a good and valuable consideration, relying upon the security of the said lands, and without notice of any claim of said plaintiff thereto, or to any part thereof.

That said agreement, marked "A," is hereto attached, and
54 made part thereof, and is in full force as a lien upon said lands in Schedule "B," attached to said complaint, set forth.

19½. They deny that a contest between the plaintiff and this defendant, the Saint Paul and Sioux City Railroad Company, for the lands in controversy in this suit, before the Secretary of the Interior, in the year 1873, the officers, agents, and attorneys of said defendant, viz., E. F. Drake, president, John B. Bloss, attorney, and R. Blakely and —— Merriam, directors, or any of them, represented, stated, or affirmed, that it (said defendant) had located and constructed its road along and past the lands in controversy, and to the south line of this State, or that any officer, agent, or attorney of said

defendant made any representation, statement, or affirmation in reference to the location or construction of said road, save as hereinafter stated.

55 They deny that such representations, to wit, those alleged in paragraph 30 of said last-amended complaint, were made in the presence of the Secretary of the Interior, and said persons named in said paragraph by the said officers, agents, and attorneys of said defendant, or by any of them.

They admit that maps of construction of said road were forwarded by the Governor of Minnesota, and filed in the General Land Office at Washington. That said maps were made and deposited with the Governor by certain persons who were at the said time and prior and subsequent thereto officers of the defendant, The Saint Paul and Sioux City Railroad Company, and also of the Sioux City and Saint Paul Railroad, referred to in said last-amended complaint, and who were in control and management of both said companies at and during all of said period, and had the control and management in connection with the directors; also, in great part, the same for both

56 companies of the construction of said road throughout its entire length. That the facts in respect of the construction of said line of road are fully hereinafter in this answer set forth.

That whether the said Stewart, Lamberton, and Mitchell had sole charge and conduct of the said contest on part of the plaintiff these defendants have not sufficient knowledge or information to form a belief. And as to whether said officers and agents of the plaintiff believed or relied or acted upon said or any representations and statements of any officers or agents, whether made orally or otherwise, as to whether they tacitly or otherwise assented to their truth, or whether the Secretary of the Interior believed or relied upon said or any representations or statements so alleged to have been made, or whether said plaintiff so believes, these defendants have not sufficient knowledge or information to form a belief. They aver that the said contest related solely to priority of location of said road of said contestants, as hereinafter fully set forth.

57 They deny that any representations made by the officers or agents of said defendant were false, as alleged in said paragraph 30, or made by said defendants' said officers and agents, knowing their falsity, or with the intention to deceive or mislead the agents or attorneys of the plaintiff or the Secretary of the Interior, or that the same did deceive or mislead the Secretary of the Interior or the said officers or agents of the plaintiff.

They aver that the facts in respect to the location of said road, the construction thereof, and the existence of the said Sioux City and St. Paul Railroad Company, and the extent of the road constructed, controlled, and operated by it, were as these defendants believe well known to said plaintiff and to its said officers, agents, and attorneys, and generally throughout the State of Minnesota prior to the year 1873 and during the time of the pendency of said contest referred to in said paragraph 30, which facts are hereinafter fully set forth.

58 20. Further answering, these defendants allege that under

and by virtue of an act of the Territory of Minnesota, approved March 3rd, 1855, entitled "A bill for an act to incorporate the Root River Valley and Southern Minnesota Railroad Company, was created, incorporated, and organized, with all the powers, rights, franchises, and immunities in said act specified and granted.

21. That by an act of Congress approved March 3, 1857, entitled "An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State, the United States granted to the Territory of Minnesota, to aid in the construction of railroads within said Territory over certain lines or routes designated in said act, certain lands
59 on either side of said lines or routes, as specified in said act of Congress, reference to which is hereby made for greater certainty.

22. That by an act of the said Territory of Minnesota, approved May 22, 1857, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State,'" the said Root River Valley and Southern Minnesota Railroad Company was authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate a railroad with one or more lines or tracks from St. Paul and Saint Anthony *via* Minneapolis to a point of junction at Shakopee City, in the county of Scott, and thence *via* Belle Plaine, Clarksville, Lesueur, Travene des
60 Sioux, St. Peter, Kasota, Mankato, and South Bend to the southern boundary of the Territory of Minnesota, in the direction of the mouth of the Big Sioux river, and granting to said Root River and Southern Minnesota Railroad Company all the lands, interest, rights, powers, and privileges granted to and conferred upon the Territory of Minnesota in and by virtue of the said act of Congress, approved March 3rd, 1857, which were applicable to the line and road above herein set forth, subject to the provisions in said act of said Territory, and in said act of Congress set forth.

23. That by an act of the said Territory of Minnesota, approved May 3rd, 1857, entitled "A bill to change the name of the Root River Valley and Southern Minnesota Railroad Company," the corporate name of the Root River Valley and Southern Minnesota Railroad Company was changed to that of the Southern Minnesota Railroad Company, and, as was provided therein, by that
61 name should thereafter be known and called in all its corporate acts and doings.

That the said Southern Minnesota Railroad Company was one of the land grant railroad companies referred to in the amendment of section ten, article nine, of the constitution of the State of Minnesota, and became entitled to and accepted the loan of State credit provided for in and by section ten, article nine, of the constitution,

subject to all the conditions and provisions of said section ten as amended, and subject to all the conditions and provisions of an act of the Legislature of the State of Minnesota, entitled "An act concerning land grant railroads," approved August 12th, 1858. And the bonds of the State of Minnesota, to the amount of five hundred and seventy-five thousand dollars, were issued and delivered to the Southern Minnesota Railroad Company under and in pursuance of and on the terms and conditions specified and provided in the said section of the constitution, and in the last cited act of
62 the Legislature of the State.

24. That to secure the payment of the principal and interest of the said State bonds so delivered to the said Southern Minnesota Railroad Company, the said company issued and delivered to the State of Minnesota five hundred and seventy-five of its first mortgage bonds, of the denomination of one thousand dollars each, bearing interest at the rate of seven per cent. per annum, payable semi-annually, and granted, sold, transferred, and assigned unto Benjamin Pringle and Andrew G. Chatfield, as trustees, and to be by them held in trust, the entire railroads of the said Southern Minnesota Railroad Company, and all the rights, property, privileges, and franchises of said Southern Minnesota Railroad Company, of every kind, which was then owned by said company, or which should thereafter be acquired by it, together with all the rights, title, interest, and claim, whether legal or equitable, which the
63 said company then had or possessed, or which it might afterwards acquire, in and to any lands granted in said act of Congress approved March 3rd, 1857, and under any of the acts of the Legislature of the Territory of Minnesota, to be by them held in trust, and authorizing said trustees, in case the said Southern Minnesota Railroad Company should fail to pay the principal or interest of said State bonds, or of the said first mortgage bonds, as the same became payable, to enter into and upon, and take possession of, all and singular the premises, property, rights, and franchises granted in trust as aforesaid, and to sell and dispose of the same for the payment of the said principal and interest, as in said trust deed provided, and to make and deliver to the purchaser or purchasers good and sufficient deeds, in fee-simple absolute, for the same, and out of the moneys arising from such sale to pay
64 the said principal and interest; and in case of the neglect or refusal of said trustees to enter upon and take possession of and sell said property, rights, and franchises, then the Governor of the State of Minnesota was, in and by said trust deed, authorized and empowered to do and perform all acts and things necessary and proper to be done in and about such sale and foreclosure for the purpose aforesaid in as full and ample a manner as said trustees might or could have done, which said trust deed was duly filed and recorded in the office of the secretary of State, and is hereby referred to for greater certainty.

25. That the said Southern Minnesota Railroad Company made default in the payment of the interest due on the State bonds delivered to it as aforesaid, which said interest became due on the first

day of June, A. D. 1860, and also made default in the pay-
65 ment of the interest on its said first mortgage bonds which fell due on the first day of April, A. D. 1860, and said trustees having refused and neglected to foreclose the said trust deed or sell the said property, lands, and franchises, as they were authorized to do as aforesaid, the Governor of the State of Minnesota did, as he was duly authorized and required by law to do, on the 16th day of October, A. D. 1860, after having given due and legal notice thereof, sell at public auction, and did bid in and purchase for and in the name of the State, all the lands, properties, rights, privileges, and franchises in said deed embraced and contained, and did, on the 20th day of October, A. D. 1860, transfer and confey the same to the State of Minnesota by deed of that date duly executed.

26. That the State of Minnesota thereupon and thereby acquired and became possessed and the owner of all and singular the
66 rights, property, privileges, and franchises of every kind which the said Southern Minnesota Railroad Company had ever owned or possessed, and held the same without merger or extinguishment; and on the 4th day of March, A. D. 1864, the State of Minnesota, by chapter 2 of an act approved on that day, entitled "An act to facilitate the construction of the Southern Minnesota railroad, and to amend and continue certain acts in relation thereto," granted, vested in, and transferred to Horace Thompson, D. W. Ingersoll, S. W. Farnham, Andrew G. Chatfield, Isaac Lincoln, F. A. Donahower, John J. Porter, P. Berkey, H. C. Smith, John L. Merriam, F. R. E. Cornell, E. W. Cutter, Eli B. Ames, J. S. Letford, William Huey, R. B. Laird, and Isaac Marks, their associates and successors, all the rights, immunities, benefits, privileges, franchises, lands, interests, and property of or which had be-
longed to or been owned by the said Southern Minnesota
67 Railroad Company appertaining, relating, or applicable to the said line of road from St. Paul and from St. Anthony *via* Minneapolis to a point of junction at Shakopee City, in the county of Scott, and thence *via* Belle Plaine, Clarksville, Le Sueur, Traverse des Sioux, Saint Peter, Kasota, Mankato, and South Bend to the southern boundary of the Territory in the direction of the Big Sioux River, which said persons, their associates and successors, were to be known by the name of the Minnesota Valley Railroad Company, and were to exercise all the powers, rights, and privileges appertaining to the road last above described and designated for the purpose and on terms and conditions in said act of March 4th, 1864, provided; that in and by said act, among other things, it was provided that if at any time the Congress of the United States should grant aid in lands or otherwise to aid in the construction of the rail-
road provided in said chapter 2, all such lands or aid so
68 granted to the State were pledged, granted to, and vested in the said Minnesota Valley Railroad Company, reference to which chapter and all provisions thereof is made for greater certainty.

27. That on the 16th day of March, A. D. 1864, the said persons named in said chapter 2 of said act of March 4th, 1864, under and

pursuant to said act met at St. Paul, Minnesota, and organized as a board of directors of the said Minnesota Valley Railroad Company, and thereupon, on said March 16th, 1864, accepted said grant and the powers and privileges thereby conferred, and entered upon the discharge of their duties as such directors.

28. That the said Minnesota Valley Railroad Company thereupon became entitled to, invested with, and possessed of all the rights, immunities, benefits, privileges, franchises, lands, interests, and property aforesaid appertaining to the line of road last aforesaid
69 which the said Southern Minnesota Railroad Company had at any time previous owned, possessed, or been entitled to under any of the laws of the Territory of Minnesota, or of the United States, or which the State of Minnesota acquired and held by virtue of any of the proceedings aforesaid.

29. That in the year 1857 and prior to any definite location of the road of said plaintiff the said Southern Minnesota Railroad Company definitely fixed the route of its said road from Saint Paul through the points designated in said acts of Congress and the Territory of Minnesota to and beyond the west line of section 31 aforesaid, and did file maps thereof, duly authenticated by the proper officers of said company, in the office of the Governor of Minnesota, and the same or duplicates thereof, properly certified, were by him forwarded to the Secretary of the Interior, and filed in the General Land Office, where they have ever since remained.

That thereupon the Secretary of the Interior directed that the
70 lands appicable to said road under the act of Congress of March 3, 1857, and which has not been sold or reserved, or to which the right of pre-emption had not attached at the time when the route of said road was definitely fixed as stated herein, be, and the same was, withdrawn from market sale and pre-emption for the use and benefit of said road; that a portion only of the lands to which defendant corporation was and became entitled as stated herein have been received by it, but that a large quantity of said lands have been and were received by said plaintiff; that no contest arose or was had between said parties before the Secretary of the Interior respecting said lands or any part thereof, nor was any question or matter of fact made or raised by either party in the premises; but a portion of said lands, among which were the lands referred to in paragraph 25 of said last amended complaint, were certified by the Secretary of the Interior to the State of Minnesota for the use and
71 benefit of said plaintiff and said Saint Paul and Sioux City Railroad Company as tenants in common, and were conveyed to said companies accordingly; that no question of priority of location or the effect thereof was considered or determined by the Secretary of the Interior, and his action in the premises was a mere routineand ministerial matter.

30. That prior to the 5th day of April, A. D. 1859, the said Southern Minnesota Railroad Company did survey and definitely fix and stake out upon the face of the earth its line of road from range thirty-one specified in said plaintiff's last amended complaint to section 19 in range forty therein named, and did cause to be made

duplicate maps of the same, and the said maps, duly authenticated, were, on or before said last-named date, filed in the office of the Governor of the State of Minnesota and in the General Land Office of the United States at Washington, properly endorsed and certified,
where they have ever since remained.

72 That said line of said road was and was intended by said company as the definite location of its route of road by order of the board of directors of said company, and has never been abandoned or changed as such definite location, but has been considered and held to be such definite location of said road ever since said April, 1859, and no other definite location has been made or attempted; that no other or greater variation from said line of definite location has been made in the said line as constructed than was deemed absolutely essential for engineering purposes by the engineer in charge, and so made by him without order of the board of directors of the company, defendant herein, or of said Sioux City and Saint Paul Railroad Company.

31. That the line of road of said plaintiff was not definitely located between said ranges 31 & 40 at any time, and that said line has never at any time been surveyed and staked out pursuant to

73 any order or direction of the board of directors of said plaintiff, or been ratified or confirmed by said board.

That a partial and incomplete survey of a temporary line was made in the spring of the year 1864, from the west line of said range 31, in a southwesterly direction toward certain coal fields then supposed to exist in that vicinity, but not with the intent or for the purpose of definitely fixing the route of said road on said line. That said temporary line was not run as aforesaid in the direction of or towards the western terminus of said road, as contemplated in said act of March 3rd, 1857, nor as subsequently definitely fixed by another and full survey made in the year 1869, and not operate to definitely fix said route on said line so first partially and imperfectly run, as stated herein.

That the line of said road passed — and along the lands in controversy herein is the same line laid down and shown upon the map, Exhibit "A," attached to said plaintiff's original complaint in

74 this action, as its constructed line, and said road has not been constructed upon or near (except at one or two points) said first or preliminary line, nor elsewhere, save only upon said line so definitely located in the year 1869, and at a distance for the most part of several miles from said first line. That in the year 1867 the Chicago and Northwestern Railway Company, a corporation organized and acting under and by virtue of the laws of Illinois, became the owner and seized and possessed of the sole beneficial interest in the rights, property, and immunities of said plaintiff and its said road, built and unbuilt, and has ever since that time controlled and operated the same for its sole use and benefit.

That said portion of said line extending from the west side of said range 31 to the western terminus was constructed and equipped by said Chicago and Northwestern Railway Company through

75 its own officers and agents, with its own means, and in the mode

and manner by it deemed best, and that since said year 1867 the corporate name of said plaintiff has been used by said railway company in the premises but colorably, and with no other purpose than to subserve its own interests.

That said plaintiff has no real interest in the premises, and has not had since said year 1867, or in the event of this suit, as these defendants are informed and verily believe to be true.

32. That by an act of Congress approved May 12th, 1867, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," the United States granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from St. Paul and St. Anthony *via* Minneapolis to a convenient point of junction west of the Mississippi, to the southern boundary of the State, in
76 the direction of the mouth of the Big Sioux river, four additional alternate sections of land per mile, to be selected upon the same conditions, restrictions, and limitations as are contained in the act of Congress of March 3rd, 1857, hereinbefore referred to, and provided that the land so located might be selected within twenty miles of the line of said road, but in no case at a greater distance therefrom; that thereupon said granted lands were duly withdrawn from sale and pre-emption, and reserved for the sole use and benefit of said line of road, as hereinafter stated.

That by an act of the Legislature of the State of Minnesota, approved March 2nd, 1865, entitled "An act to accept the grant and in execution of the trust made and created in and by section 17 of an act of Congress approved May 12th, 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State," the State of Min-
77 nesota did accept said grant, and undertook and assumed the trust made and created in section 17 of said act of Congress of May 12, 1864, and did also grant to and vest in the said Minnesota Valley Railroad Company all the lands, interests, rights, powers, and privileges granted to said State in and by said section of said act of Congress, reference being hereby made to said act of March 2nd, 1865, for greater certainty.

34. That by an act of the Congress of the United States, approved July 13, 1866, entitled "An act relating to land granted to the State of Minnesota to aid in constructing railroads," the time named in the act granting lands to the Territory of Minnesota to aid in the construction of a certain railroad from St. Paul and from Saint Anthony *via* of Minneapolis to a convenient point of junction west of the Mississippi river, to the southern boundary of the Terri-
78 tory, approved March 3, 1857, for the construction and completion of said road, should be and was extended for seven years from the passage of said act, to wit, reference being had to said act of July 13, 1866, for greater certainty.

35. That by an act of the Legislature of the State of Minnesota, approved March 5th, 1867, entitled "An act to authorize the Minnesota Valley Railroad Company to construct a branch from Mankato, or some point near thereto, to the south line of Faribault

county," the said Minnesota Valley Railroad Company was authorized to change the name of said company by resolution of its board of directors, and adopt any suitable name by which said company might thereafter be known. That thereupon and thereafter the board of directors of said company did, by resolution of said board, adopted at a meeting thereof, duly called and held, change
79 the name of said company, and did adopt the name of the Saint Paul and Sioux City Railroad Company as and for the name of said company. That by an act of the Legislature of the State of Minnesota, approved March 1, 1870, entitled "An act relating to the St. Paul and Sioux City Railroad Company," the State of Minnesota approved said new corporate name so selected by said company as aforesaid, and confirmed all lawful acts of the said company done under said new name, and continued said company by the name so assumed, with all the rights and privileges theretofore or thereafter conferred by law, and repealing all inconsistent acts.

36. That said Saint Paul and Sioux City Railroad Company, on or about May 16, 1870, filed with the secretary of State of Minnesota a certificate, signed by its president and secretary, setting forth the said change of names and the acceptance of said of the provisions of said act.

80 37. That the defendant, The Saint Paul and Sioux City Railroad Company, has constructed and completed, and did, within*in* the time and in the manner specified and required by the laws of the United States and of the Territory and State of Minnesota, survey and locate, where such survey and location had not been previously made, as stated aforesaid, and constructed and completed as and in the manner hereinafter stated, a line of railroad from St. Paul through the county of Scott and the points designated in the third chapter of the act of the Territory of Minnesota, approved May 22nd, 1857, to the southern boundary of the State, in the direction of the mouth of the Big Sioux river, and long before the commencement of this action in all respects did comply with and conform to the provisions, conditions, and requirements
81 of the several acts of Congress granting lands to aid in the building of its said road; and by the location and construction of its line of railroad, as aforesaid, it became and was and is entitled to the lands granted by the acts of Congress aforesaid to aid in the building of said line of railroad.

38. That said road was definitely located from Saint Paul as far as the west line of range 40 aforesaid prior to April 5, 1859, by the said Southern Minnesota Railroad Company, to whose rights, franchises, and property this defendant, The Saint Paul and Sioux City Railroad Company, duly succeeded, as stated herein; that from said west line of said range 40 this defendant definitely fixed the route of said road to the southern boundary of the State of Minnesota on and prior to July, 1866.

That maps of said location, duly authenticated, were filed in the office of the Governor, and the same, or duplicates thereof,
82 duly certified by said Governor, were by him forwarded to the General Land Office at Washington, D. C., and therein

filed, and the same have been accepted and used by said office in the adjustment of said land grants, and in the certification of lands applicable to said defendant's said line of road, as indicating and showing the definite location of the whole line of said road designated in said act of Congress of March 3d, 1857; and no other line or route or maps thereof has ever been recognized or made the basis of adjustment of said lands at any time or in any way whatever.

That the line of said road having thus been definitely fixed, the said Saint Paul and Sioux City Railroad Company, from time to time prior to 1872, constructed portions of its said road upon and as near to the said line of definite location as was feasible and practi-
cable in view of engineering rules and principles applicable
83 in such cases, and completed about 121 miles thereof from said Saint Paul and as far as St. James, on and prior to the year 1872, and did, in the year 1871, enter into a contract and agreement with the said Sioux City and Saint Paul Railroad Company named in said last amended complaint, whereby and by the terms whereof said last named company agreed to do and perform the work necessary to build and complete the remaining portion of said road from said St. James to the State line, and to equip and operate the same in connection with the first named portion of said road, and as a part of the road of said Sioux City and Saint Paul Railroad Company then being built from Sioux City, in Iowa, to a junction with the said road in Minnesota at the State line; that said work was to be done in the year 1871.

That in consideration thereof, and of certain other covenants in
said agreement contained, the said Saint Paul and Sioux
84 City Railroad Company agreed to transfer, and did transfer and assign, unto the said Sioux City and St. Paul Railroad Company its right, title, and franchises pertaining to said portion of said road from St. James to said junction at the State line, and to use and operate the same as a part of one continuous line of road from said Sioux City to St. Paul, and also its rights and interests in and to the lands granted by Congress to aid in constructing the road lying within the original six-mile limits of the grant (of March 3, 1857), from a point twenty miles west from the west side of range No. 31, being all the lands in place "westerly from that point, to be taken according to the mode of adjusting adapted in such cases, commencing at the west end of the block of advance sections retained by the said Saint Paul and Sioux City Railroad Company
lying immediately west of range No. 31, the right to which,
85 and to all lands applicable to said portion of road from St. Paul and St. James, not being transferred or affected in any manner or to any extent whatever by said agreement.

That said contract was duly performed and said road completed and equipped, and the same has been maintained and operated since said year 1871 from St. Paul to Sioux City aforesaid in manner aforesaid; all of which, as defendants believe, said plaintiff had due notice and knowledge.

40. That said contract and arrangement was entered into and carried out under and by virtue of the law of Minnesota, approved

March 5, 1869, entitled "An act authorizing a consolidation of certain railroads," and is the same transaction and construction of road referred to in said last amended complaint; and that by reason of the premises the said Saint Paul and Sioux City Railroad Com-
86 pany is entitled to the lands in controversy herein and each and every of the same.

41. That under said act of Congress of March 3, 1857, and of May 12, 1864, and by the rules, regulations, customs, and practices of the General Land Office governing the adjustment of land grants in such cases, the said St. Paul and Sioux City Railroad Company, by the definite fixing of the route of its said road, as stated in this answer, and by reason of the construction of its said line from St. Paul to St. James, as stated herein, earned and became entitled to all and singular the lands designated by odd numbers, lying within twenty miles on either side of its said line of definite location to which the right of pre-emption had not attached, or which had not been sold or reserved at the date when said line or route was definitely fixed, to an amount sufficient to make up the full quantity
87 granted as aforesaid, to aid in the construction of said 121 miles of road. That at and before the date when said line of road was definitely fixed from Saint Paul to said west line of range 40, the United States had disposed of, and the right of pre-emption had attached to, so many odd-numbered sections within 15 miles of the said line that the remaining odd alternate sections within said distance failed and were insufficient to make up the number of acres to which said Saint Paul and Sioux City Railroad Company was and became entitled to by and on account of the building of its said road from said Saint Paul to said St. James, and that all the lands designated in said Schedule "B," attached to said complaint, would not make up said deficiency. That at and prior to the passage of said act of Congress of May 12, 1864, the United States had reserved and sold, and the right of pre-emption had attached to,
88 so many of the lands designated and granted in said act to aid in building said last named line of road that the remaining alternate sections within the limits named in said act failed and were insufficient to make up the number of acres to which said Saint Paul and Sioux City Railroad Company was and became entitled to under said act of Congress, by and on account of the building of its said line to said St. James as aforesaid, and all the lands designated in said Schedule "B" will fail to make up such deficiency; that the same are nearest the said line of road of defendants, and the only lands applicable under said grant to make up said deficiency. That prior to the passage of said act of May 12, 1864, the said plaintiff had acquired no right to or interest in said lands in controversy herein, nor to any part of the same, nor had any of the same
89 been sold, or reserved, or appropriated for any other purpose than to aid in the construction of said line of road of said St. Paul and Sioux City Railroad Company, as stated herein.

That by reason of the premises, and of the fact of said deficiency of lands between said St. Paul and St. James coterminous with the constructed portion of said definitely-located line between said

points, the said St. Paul and Sioux City Railroad Company was and became entitled to a sufficient quantity of land, granted as aforesaid, lying *lying* west of said St. James and within twenty miles of either side of its said located line, to make up the deficiency set forth as aforesaid. That being so entitled, and before said plaintiff had acted in the premises, said St. Paul and Sioux City Railroad Company duly selected all and singular the lands in said Schedule "B" set forth, and tendered to the proper officers of the United States the legal fees in that behalf provided, and demanded that a list of said lands be transmitted by said officers to the proper officer at Washington for his action.

90 That said officers to whom and upon said tender and demand was made refused to comply therewith, and thereupon, in the year 1872, a contest respecting said lands arose between said plaintiff and said St. Paul and Sioux City Railroad Company, which is the same contest referred to in paragraph 30 of said last amended complaint.

That said contest was carried on before the Land Department at Washington and the Secretary of the Interior, in the years 1872 and 1873, and the sole matters of fact in issue between the parties to said contest and litigated therein were the date and fact of the definite location of said road, and of filing a map or maps thereof in the General Land Office at Washington.

The several hearings and rehearings were had and proofs taken and presented on both sides upon said controverted matters, and such proceedings had in the premises that the Secretary of the Interior found and decided as matter of fact that the line of road of said St. Paul and Sioux City Railroad Company,

91 along and past the lands in controversy as far as the west line of said range 40, had been and was definitely fixed as contemplated and required by law, and the rules, customs, and practices of his department, at least as early as April 5th, 1859, and the proper map of such route duly filed in the General Land Office on April 12, 1859; and he further found, and decided as matter of law, that priority of location gave priority of right, and thereupon awarded said lands to said Saint Paul and Sioux City Railroad Company, and the same was certified to the State of Minnesota for the use and benefit of said last-named company prior to the commencement of this action; that no question was made at any time during said contest as to how, or in what particular manner, or by whose hands or procurement said road, from Saint Paul to the State line, or any part thereof, was constructed; that no proof was taken or offered on that point, nor any map of construction presented, nor any repre-

92 sentations made thereabout, or statements or declarations by any officer or agent of said Saint Paul and Sioux City Railroad Company; that is one of the arguments made in the case by John B. Bloss, named in said paragraph 30 of said last amended complaint; it was incidentally stated that said road of said last-named company had been first constructed through to the State line, but without reference to such fact or matter as an issue in the contest, and without any intention to deceive or mislead any one; and de-

fendants aver that said statement so made in argument did not deceive or mislead any officer, agent, or attorney of said plaintiff, or the Secretary of the Interior, and that his said decision was not controlled or influenced by said statement, or by the fact of first construction of said road; that said facts relative to location and maps found in favor of said Saint Paul and Sioux City Railroad Company were and [are] wholly independent of the construction of said
93 road, and the finding and decision upon the former were and are not controlled, influenced, or affected by the existence or non-existence of the latter.

That the said proceeding was commenced, conducted, and concluded according to law and the rules and regulations of said Land Department, and said officers, and each of the same, had full jurisdiction of the subject-matter and of said parties, and full authority to act in the premises. That said finding, decision, and award of the Secretary of the Interior in said proceedings is conclusive and binding in the premises, and cannot be reviewed or reversed in this action as to said matters of fact so found and decided by him, as stated herein, and the same are herein referred to, set up and interposed as binding and obligatory upon the plaintiff and defendant herein and upon this court.

43. That, on the 7th day of July, 1864, and before any definite or other location of the line of said plaintiff's road between
94 ranges 31 and 40 aforesaid had been made, the lands applicable as aforesaid to the said line of road of the defendant, The Saint Paul and Sioux City Railroad Company, and which included the lands in controversy in this action, were, by the proper authority of the United States, withdrawn from sale, pre-emption, and other disposal, being the odd-numbered sections within twenty miles on either side of said last-named road, to be held, reserved, and applied for the sole benefit of said Saint Paul and Sioux City Railroad Company. That at the date of said withdrawal of said lands the same were not appropriated or held for any other purpose than for the sole benefit of the defendant, The Saint Paul and Sioux City Railroad Company, and no right of said plaintiff had attached to the same, or any part thereof, whether in connection with the location of its said line of road, or otherwise. That a correct
95 list and description of said lands is set out in Schedule "B," attached to said plaintiff's complaint herein.

44. That said lands were duly selected by the State of Minnesota, and by said Saint Paul and Sioux City Railroad Company, for the benefit of said last-named company, long prior to any survey or location of said plaintiff's road, and long prior to the construction of said plaintiff's road, as alleged in said plaintiff's complaint, and the said lands are all and singular needed and necessary to make up and supply to said Saint Paul and Sioux City Railroad Company, the quantity of land granted by said act of Congress, and of the State of Minnesota, to said companie's said line of road. That prior to the time when said line of road was definitely located from Saint Paul through the said points designated in said act of Congress of March 3rd, 1857, along and past the lands in controversy

herein, the United States had sold, and rights of pre-emption
96 had attached, to so many of the alternate sections of land, designated by odd numbers, lying within the six-mile limits of said line of road. That the alternate odd sections lying within said six-mile limits, and not so sold or pre-empted, were not sufficient to make up the quantity of lands granted and due to such defendant, The Saint Paul and Sioux City Railroad Company, as aforesaid, for the building of its said road as far as the west line of said range 40, and that all the lands in controversy herein will not amount to or exceed said deficiency, and were duly certified to the Governor of the State of Minnesota, by the Secretary, as deficiency land, so called, granted by the acts of Congress aforesaid, to aid in the building of the line of road of the defendant, The Saint Paul and Sioux City Railroad Company, as stated therein.

45. That the defendants aver, upon their information and belief, that the State of Minnesota has done and performed all the
97 conditions on its part to be performed to secure and perfect its right to the lands hereinbefore referred to and set forth to aid in the building of the said road of the defendant, The Saint Paul and Sioux City Railroad Company, and that said railroad company has done and performed all the conditions on its part to be done and performed, as a condition to its right to such lands, and all of the same, to aid in the building, and for and on account of the building of its said road.

46. That it is and was, prior to the commencement of this action, the rule, custom, and well-settled practice of the General Land Office of the United Staes, in case of railroad grants claimed to be conflicting, and where different railroad companies made claim to and application for the same lands on account of constructed road, to regard priority of location as decisive of the controversy; that the road first definitely located upon the face of the earth, and afterwards built according to the terms of the act making the
98 grant, was entitled — and should receive its full quota of lands within both its six and fifteen-mile limits, and whatever limits were fixed by law, to the entire exclusion of any other road, the definite location of which was subsequent thereto; and that in accordance with such rule, practice, and principle, the Secretary of the Interior awarded the defendant, The Saint Paul and Sioux City Railroad Company, the lands in controversy in this action, as hereinbefore stated, of all which the said plaintiff had due notice and knowledge prior to the commencement of this action; that the evidence of both said companies upon the question of location was all placed before the Secretary of the Interior, who held and decided it, after full consideration thereof, that the said road of the defendant, The Saint Paul and Sioux City Railroad Company, was definitely located upon the face of the earth through the lands in controversy herein long prior to such location of the road of said plaintiff, and these defendants allege that such finding
99 and decision is conclusive upon said plaintiff, and that it is and will be unjust and inequitable for said plaintiff to re-open

and have retried and re-adjudicated said finding so made by the Secretary of the Interior, or to set aside his said award.

46½. That by virtue of and on account of the said several premises the said Saint Paul and Sioux City Railroad Company has become, and is, in law and equity the owner, and possessed of and entitled to receive a deed of all and singular the said lands described in Schedule "B," attached to said last amended complaint, from the Governor of the State of Minnesota, as provided by law.

47. That the Governor is ready and willing to execute said deed, and would have executed and delivered said deed to said Saint Paul and Sioux City Railroad Company, in discharge of his official duty in the premises, had not said company been enjoined from re-
100 ceiving or accepting said deed by the mandate of this court.

48. That the said writ of injunction which was issued herein, and served on said Saint Paul and Sioux City Railroad Company at the time of the commencement of this action, was inadvisedly and prematurely issued, and its pendency operated harshly and oppressively upon the said railroad company, and the said writ would be vacated and set aside.

49. That the State of Minnesota and the Hon. Cushman K. Davis, Governor, are necessary parties to this action, and that there is, therefore, a defect of parties defendant herein.

50. Therefore these defendants demand judgment that said plaintiff take nothing by this action, that they recover costs and disbursements against said plaintiff, and have such other judgment, order, or decree as may be just.

(Signed) E. C. PALMER,
Attorney for Defendants Answering herein.

101 STATE OF MINNESOTA, }
County of Ramsey, } *ss.:*

E. F. Drake, being sworn, says: He is president of the Saint Paul and Sioux City Railroad Company, one of the defendants in the above-entitled action; that he has been such president for more than ten years last past; that the foregoing answer is true, of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

(Signed) E. F. DRAKE,
President of the Saint Paul and Sioux City Railroad Co.

Subscribed and sworn to before me on this 14th day of December, A. D. 1875.

[SEAL.] (Signed) CHAS. H. BELL,
Notary Public, Ramsey County, Minn.

102 *First Bill of Exceptions.*

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth Judicial District.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS H. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow.

Be it known that the foregoing action was brought on for trial before the court in July, 1875, upon the issues joined by the amended complaint, verified the 2d day of February, 1875, and the answer thereto verified, the 6th day of April, 1875, and the reply, verified the 1st day of May, 1875. During the progress of the trial several adjournments and postponements were had, some of which, prior to the suspension of the trial on the 7th day of October, 1875, were to a fixed and definite time, and others for an indefinite time, to be afterwards fixed to suit the convenience of the parties and
103 counsel, and so as not to interfere with the other official duties of the court. And during the progress of the trial, to suit the convenience of parties, counsel, and witnesses, witnesses were called out of order—some whose evidence was not suited to be used as rebuttal were called and examined before the evidence in chief of plaintiff was closed, and some for defendant before plaintiff's case was closed.

Upon the commencement of the trial, after the introduction in evidence by the plaintiff of a certified copy of a map, offered a map of the line of location of plaintiff's road from range 31 to range 38, and which was received in evidence under the objection of defendant that the same was incompetent, immaterial, and irrelevant, and to the ruling of the court in receiving which defendant duly took exception, which was allowed and noted by the court. One Isaac C. Brewer was sworn as a witness on the part of the plaintiff, when the defendant objected to the receiving of any evidence in
104 the case, upon the grounds that the proper parties were not before the court, and that the court had no jurisdiction of the subject-matter of the action or of the parties; which objection was by the court overruled and evidence received, the defendant duly excepting to such ruling of the court. The plaintiff, further to prove the issues on its part, introduced a large amount of documentary evidence and had sworn and examined a large number of witnesses, to a part of which evidence and testimony the defendants objected upon the grounds aforesaid, and upon the ground that the same was incompetent, immaterial, and irrelevant; but the court overruled said objections and noted exceptions for defendants to those items of evidence and portions of the testimony objected to as aforesaid, and the plaintiff then rested the case on its part.

And thereupon the said defendants introduced a large amount of evidence and had called and sworn a large number of wit-
105 nesses to maintain said issues on its part and in opposition

to the evidence introduced by the plaintiff, and was proceeding to introduce other evidence, not having rested the case on its part, when the plaintiff, upon affidavits then presented to the court, and for the reasons and upon the grounds therein set forth, applied to the court for leave to amend its said complaint, and change the same and introduce new matter not herein alleged, to wit, the matter set forth in an order allowing said application, and on file in the office of the district clerk of said court, reference whereto is hereby made as part hereof, and a copy whereof is to be attached hereto and made a part hereof. Such application was resisted and objected to by defendants' counsel, who introduced affidavits in opposition to the motion, and upon a hearing of said application the same was by said court then and there granted, to which application and ruling said
106 defendants then and there excepted, and their exceptions were allowed and noted by said court.

And at the same time, and as a part of the same application, and based upon the same affidavits presented as aforesaid on the part of plaintiff, and for the reasons and upon the grounds therein set forth, the plaintiff asked leave of the court to modify and change a certain stipulation between said parties, called Stipulation "B," and which had theretofore been put in evidence in said cause, together with another stipulation, called Stipulation "A," in the manner set forth and shown in said order last aforesaid, which application was also resisted and opposed by defendants' counsel, and upon the affidavits presented to the court as aforesaid on the part of defendants and upon consideration of the matter the court made the order allowing such application, and which is the order last above referred to; to which application and ruling and
107 order therein defendants' counsel then and there excepted, and such exceptions were allowed and noted by the court.

When it was announced by the court that the amendments applied for in respect to such complaint and stipulations would be allowed, and the order therefor had been made in writing, the defendants took these specific exceptions, which were allowed and noted by the court, that is to say: "The defendant excepts to each one of the several amendments of the amended complaint, and to the ruling of the court in respect to the allowance of each one of them, and to the entertaining of the motion at all by the court, that it is not a proper exercise of discretion; defendant also objects and excepts to the action of the court upon the Stipulation "B" that it is incompetent for the court to change or modify Stipulation "B," or any part thereof; that one portion of the stipulation between counsel
108 in regard to facts cannot be changed by the court without setting aside the whole stipulation; and defendant objects and excepts to the order of the court in regard to the stipulation and to every part thereof on the grounds aforesaid, and as being in the alternative: that the court can only set aside or refuse to set aside a stipulation, and cannot require defendants to elect as indicated in the order."

Said stipulations are herein referred to and made part hereof, and are to be attached hereto by true copies and form part hereof, to-

gether with the written objections to said motion and application made by said defendants as aforesaid and filed in said cause.

The plaintiff's attorney was then and there directed, verbally, by the court to insert at the proper places in the complaint the amendments allowed, and to deliver to the defendants' attorney a
109 copy thereof as the same should be thus amended, and at the same time it was ordered by the court that the defendant should have twenty days after such service to serve amended answer to such amended complaint; and thereupon on the 7th day of October, 1875, the trial of such action for the time ceased.

Afterwards plaintiff served upon defendants' attorney a copy of such complaint, amended in accordance with the direction of the court, and duly verified.

And afterwards, and before the trial of the cause was resumed, to wit, on the 27th day of October, 1875, the defendants' attorney applied for an order to show cause, which was granted, and in the following words, viz.

And on the return day of said order, and after hearing the attorneys of the parties, an order was made by the court in the words and figures following:

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth District.

110 THE WINONA AND ST. PETER RAILROAD COMPANY
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY *et al.*

Upon return of the order heretofore granted in the above-entitled action requiring the plaintiff herein to show cause why its amended complaint in said action should not be made definite and certain in respect to matters referred to in the affidavits upon which said order was granted, and after hearing counsel for the respective parties:

It is ordered that the plaintiff do so amend subdivision 30 of such amended complaint as to make the allegations therein contained definite and certain as respects the particular officers, agents, and attorneys making the representations and statements charged, to whom the same were made, and, so far as the plaintiff may be able to state, the time and place of the making of such rep-
111 resentations and statements.

That the time within which defendant may answer the amended complaint herein be extended until 20 days after compliance with this order by the plaintiff, and service upon defendants' attorney of the amendment thereby required.

Dated Nov. 6th, 1875.

(Signed) D. A. DICKENSON,
District Judge.

And on the said 27th day of October, A. D. 1875, another order to show cause was made in said action on motion of the defendants' attorney, which is as follows:

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth District.

THE WINONA AND ST. PETER RAILROAD COMPANY
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY *et als.*

On reading the affidavits of E. C. Palmer and E. F. Drake, and on motion of said E. C. Palmer, ordered that the plaintiff in
112 the above-entitled action show cause before me, at chambers, in the city of Mankato, on the 5th day of November, 1875, at the hour of ten o'clock in the forenoon, why said Stipulation "B," referred to in said affidavit, should not be wholly vacated and set aside, and why all and singular the evidence heretofore introduced in said action under and by virtue of said Stipulation "B" should not be striken out and held for naught.

Let a copy of this order and of said affidavits be served on plaintiff's attorney at least four days prior to said day of hearing.

Dated Oct. 27th, 1875.

(Signed) DAN'L A. DICKERSON,
District Judge, Sixth Judicial District.

And on return day of said last order, after hearing counsel for the respective parties, an order was made in words and figures following:

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth District.

113 THE WINONA AND ST. PETER RAILROAD COMPANY
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY *et al.*

Upon the return of the order heretofore made requiring the plaintiff in the above-entitled action to show cause why a stipulation made between the parties in such action, and known as "Stipulation B," should not be wholly vacated and set aside, and why the evidence heretofore introduced upon the trial of such action, under and by virtue of such stipulation, should not be stricken out, and after hearing counsel for the respective parties upon the matters involved in such order:

It is ordered, That the application of the defendant to vacate and set aside said stipulation and to strike out said testimony be and is denied.

Granting all that is claimed by defendant as to the circum-
114 stances under which the stipulation was made, as to the considerations which induced the framing and execution of it, and as to its being made and intended to operate as an entirety, I still do not think that sufficient cause is shown for setting aside stipulation altogether. The court, in the exercise of a discretion which, under the peculiar circumstances of the case, was believed to

be warranted, relieved the plaintiff from an admission as to one particular matter embraced in the stipulation, the admission being claimed to have been made improvidently and by mistake, and the matter admitted appearing to be, in fact, untrue; but it is not thought that hence the entire stipulation should be avoided.

A stipulation as to facts made for the purposes of the trial is not looked upon as a contract, creating rights or imposing obligations, and which is to be avoided by the alteration by order of the
115 court, and without the consent of a party of any of its material provisions; nor is it considered that the relieving of one party from an admission of a fact (even though, if such admission had not been made, the other party would have declined to enter into the stipulation at all) can be regarded as so affecting the consideration which lead to making the stipulation as to warrant setting aside the whole.

The stipulation is not a contract; it needs no consideration to support it; it is merely the admission for the purposes of the trial that certain facts are or were, as stated, thus dispensing with the necessity for proof as to those particular facts.

The admission is made because it is understood that the matter admitted is true and for the purpose of relieving the court and the parties from producing and considering evidence which, when examined, would lead to the very conclusion of facts admitted.
116 That one party has been relieved from its admission of one material fact, and that particular subject remitted to proof by evidence, in no manner affects the admission as to other and independent facts, and it is considered that a party should be relieved from its stipulation as to such other matters only upon showing that they are in fact untrue, and that they were conceded to be facts by reason of mistake or improvidently. 2d Greenleaf on Evidence, S. 206, (7th ed.)

Dated Nov. 6th, 1875.

(Signed) D. A. DICKENSON,
District Judge.

A copy of which order was served on the defendants' attorney on the 12th day of Nov., 1875.

On the 14th day of December, 1875, the defendants served answer to the complaint as it had been amended as aforesaid, and on the 10th day of January, 1876, on motion of plaintiff's attorney,
117 the court made an order in the following words and figures:

STATE OF MINNESOTA, *Blue Earth County:*

District Court.

THE WINONA AND ST. PETER RAILROAD COMPANY

vs.

THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, Charles Scheffer, William R. Marshall, Horace Hall, and George P. Wilson.

On the pleadings in this action, and on the proceedings hereto-

fore had in this action in open court, and on the order made herein in open court permitting and allowing the plaintiff to amend its complaint in the form and manner in and by said order prescribed and fixed, and on the proposed answer of the defendants, The St. Paul and Sioux City Railroad Company, Thomas H. Scott, William R. Marshall, and Horace Hall, to the plaintiff's complaint,
118 and to the amendments made to such complaint, pursuant to the order of this court as aforesaid (which said proposed answer was verified December 14th, 1875) served on this plaintiff December 21st, 1875:

Ordered that the said defendants show cause before me, at my chambers, in the city of Mankato, on the 22d day of January, A. D. 1876, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why the said proposed answer should not be struck out, and why the said defendants should not answer the said amendments made to the complaint herein in pursuance of said order of court, or, in default of such answer, why the said amendments, and the matters and facts therein alleged, should not be taken and held by this court and in this action as admitted and confessed by the said defendants, and why the amendments
119 of the answer of the said defendants should not be limited and conformed to the matters and facts alleged in and by the said amendments of the complaint.

Let a copy of this order be served on the said defendants' counsel at least six days before the day set to show cause as aforesaid.

D. A. DICKINSON,
District Judge.

Mankato, January 10th, 1876.

And on the return day of such order, after hearing the counsel for the respective parties, the court made the following order:

District Court, County of Blue Earth.

THE WINONA AND ST. PETER RAILROAD COMPANY
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY *et als.*

Upon the return of the order to show cause why the answer of the defendants in the above-entitled action to the complaint
120 therein as last amended (by order of the court) should not be stricken out, which order was returnable on the 22d day of January, 1876, and upon hearing upon the same, defendants' objections thereto upon grounds, set forth in writing and filed by the court, and upon the pleadings, proceedings, and order heretofore made and had in this action, and upon reading the affidavits of Hon. E. C. Palmer and C. Bell, Esq., and of Hon. Thomas Wilson, and on reading the answer of the defendants, served on plaintiff's attorney herein on the 14th day of December, 1875, from which it appears that as, of course, and without order of the court, certain allegations of fact raising (herein) issues not before made by the pleadings herein, and not responsive to nor rendered necessary by the amended allegations of the complaint as allowed by order of the court.

It is ordered that so much of said answer as is included in
121 folio 61 thereof and the last nine lines of folio 60 thereof be stricken out. Ordered, further, that the preliminary motion of the defendants for the discharge of the said order to show cause upon grounds therein set forth, be, and is denied.

Dated February 12th, 1876.

(Signed) D. A. DICKINSON, *District Judge.*

From this last recited order the defendant duly appealed to the supreme court of the State, and the same was brought on for hearing at the October term, 1876, of said supreme court, and on the 12th day of February, 1877, such order appealed from was affirmed, and such proceedings were had that judgment was entered in that court for costs and a mandate sent down to said district court, as by statute and the rules of court in such case provided.

Afterwards on the 27th day April, 1877, the plaintiff's
122 counsel served on defendants' counsel a notice of trial which was in the following words:

District Court, Blue Earth County, Venue changed from Watonwan County, State of Minnesota.

THE WINONA AND ST. PETER RAILROAD COMPANY

vs.

THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. Scott, Charles Scheffer, Wiliam R. Marshall, Horace Hall, and George P. Wilson.

SIR: You will please take notice that the above-entitled action will be brought on for trial by the plaintiff on the first day of the next general term of the district court to be held in and for the said county of Blue Earth, at the court-house in the city of Mankato, on the 3d Tuesday of May next, at the opening of said court on the said day, or as soon thereafter as counsel can be heard.

The plaintiff will at the time and place aforesaid move the court to proceed with and conclude and finish the hearing and trial
123 of the said cause (heretofore commenced and carried on at St. Paul) as soon as the said cause can be reached in its order on the calendar at said term of court.

Yours truly, WILSON AND TAYLOR,
Att'ys for Pl'ff.

To Hon. E. C. PALMER, *Att'y for Def'ts.*

And on the first day of the general term of the court in Blue Earth County, in May, 1876, the defendants' counsel appeared and moved the court to dismiss and deny the application of plaintiff's counsel contained in said notice of trial served on said defendants' counsel as aforesaid, and which motion was in the words following, to wit:

STATE OF MINNESOTA, *County of Nobles:*

District Court, 6th Judicial District, Venue changed from Watonwan County.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
124 THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, CHARLES SCHEFFER, WILLIAM R. MARSHALL, HORACE HALL, and GEORGE P. WILSON.

Counsel for all the defendants above named, except Charles Scheffer, who is deceased, and George P. Wilson, not represented, appear on the first day of the general May term, 1877, and move the court to deny and dismiss the application of plaintiff's counsel contained in the notice of trial served on said defendants' counsel in the words following, to wit: "The plaintiff will at the time and place aforesaid move the court to proceed with and conclude and finish the hearing and trial of said cause (heretofore commenced and carried on at St. Paul) as soon as the said cause can be reached in its order on the calendar of said term of court," upon the following grounds, viz:

125 1st. Because the placing of the cause upon general term calendar for May, 1877, by regular note of issue filed by plaintiff's counsel and giving notice of trial at said term is a waiver of the application aforesaid, and estops said plaintiff from making or insisting upon the same.

2d. Because said cause was put at issue March 16th, 1876, as appears from the admission of said plaintiff's counsel endorsed upon the answer in said cause, the order of court striking out part of said answer, and by the note of issue and calendar of said May term.

3d. Because said cause was taken by appeal to the supreme court of the State, where it remained until April 16th, 1877, when the mandate from that court was filed in this court in said cause, and the issues therein were finally settled, and thus made ready to be brought on for trial.

4th. Because the said cause has never been tried or the trial
126 of the same entered upon under the issues joined therein.

5th. Because the cause stands for trial upon the issues made and tendered in the last amended complaint and the answer thereto, and such issues and pleadings supplant and take the place of all former issues and pleadings in said cause, and cannot be affected or determined by or upon any evidence introduced upon said last-mentioned issues, or any of the same, in any previous or partial trial thereof.

6th. Because to grant said application would greatly prejudice said defendants, objecting in the trial and determination of said cause.

7th. Because said application is not based upon any affidavit, files, records, or papers in said cause, nor upon any special grounds or reasons given in or attached to the said notice.

This motion is based upon the last amended complaint in said

cause, the answer thereto, the motion to strike out said answer,
127 the order made on said motion, the notice of appeal from said order, the mandate issued by the supreme court therein, the note of issue, and notice of trial filed and given by plaintiff's counsel in said cause.

(Signed) E. C. PALMER,
Att'y and Counsel for all the Def'ts, except
C. Scheffer, deceased, and Geo. P. Wilson.

The foregoing motion, made in open court, is continued for hearing and determination at a time and place to be named hereafter by the court, upon due notice to both parties, no counsel for said plaintiff being present at the opening of this May term.

Minn., 1877.

D. A. DICKENSON, *Judge.*

The hearing upon such motion of the defendant was postponed, but subsequently, when the cause was brought on for trial, and before the trial commenced, such motion was renewed, and
128 after hearing counsel for the respective parties, the court denied such motion of defendant; to which defendant duly excepted.

The court then directed the trial of the case to be resumed in the following manner:

That the plaintiff should resume the case, presenting such evidence as might be pertinent to prove the allegations made by it in the amendment before allowed, and when plaintiff should rest the case as to such new issues, that the case should be again taken up by defendant for the introduction of such further evidence as it might desire to present to sustain the allegations in the answer, as it then stood; and when defendant should rest, the plaintiff might rebut in accordance with the practice.

To all of such order [of] the court defendant then and there excepted, and such exception was allowed and noted by the court.

129 Thereupon the trial of the action was proceeded with, pursuant to such order of the court, and in the manner therein directed, and evidence was introduced by both parties, but not upon matters in respect to which evidence had been previously introduced, nor was evidence which had been previously introduced re-offered, but was considered as properly in the case under defendants' said objections; and pursuing such order of trial, the evidence was closed, and, after argument, taken under advisement by the court, and thereafter on the 21st day of May, 1878, a decision was filed therein in said clerk's office of said district.

And leave being given to make a case or bill of exceptions, the defendants herein present the foregoing, and, in addition thereto, they set forth that during the progress of said trial the following proceedings took place:

GEORGE E. SKINNER, being sworn on behalf of plaintiff,
130 testified as follows:

I reside at Faribault, Minn.; am land commissioner of the Minnesota Central Railroad Company. The road of that company crosses the roads of both plaintiff and defendant.

Question. State how the lands granted to those roads have been adjusted and divided.

To which said defendants' counsel objected, as incompetent and immaterial and irrelevant, but not upon the ground that the record is not produced as the evidence of the fact attempted to be proved instead of parole testimony. Said objections were overruled, and an exception noted for defendant.

Answer. Lands within six-mile limits of two roads have been divided, an undivided half to each, without regard to priority of location. Same rule as to lands within common indemnity limits; but where the six-mile limits of one road conflicted with the indemnity limits of another, the first road took all the lands within its six-mile limits.

HERMAN TROTT, sworn for pl'ff, testified: That he was land
131 commissioner of St. Paul and Pacific Railroad Company, and, in answer to the question asked the witness, Skinner, gave the same evidence as to lands in connection with his road, and under the objections that the same is incompetent, immaterial, and irrelevant, and incompetent because it proposes to show what has been done in a particular case, not a general custom.

Ruling and exception as in case of said witness, Skinner.

THOMAS WILSON, being sworn, testified as follows: Am counsel for plaintiff, and as such I went to the State auditor's office and made examination of certificates of lands for railroad purposes. Did not examine all the certificates, nor all the deeds, nor can I tell when the first deed was made or the last; but I did examine many of them, and also maps of location. From that examination I believe the rule adopted by the General Government and by the State, as shown by record, to be as follows: Where the land limits of
132 one road overlapped or conflicted with those of another, the lands common to both were awarded to both, and undivided half to each. Where the six-mile limits of one and the fifteen-mile limits of another overlapped or conflicted, the lands were awarded to the road within whose limits they lay. But where the fifteen-mile limits of one road overlapped the fifteen-mile limits of another, or the six-mile limits of one the six-mile limits of another, the lands went to both. That this rule was not affected or varied by priority of location, or the fact that one road was located earlier than another.

To which testimony, and each and every part thereof, defendant objects, as incompetent and immaterial as to the subject-matter.

Def't waives objection to showing contents of records or facts

shown by them by parol testimony. But said objections were overruled and exceptions duly noted for def't.

133 H. W. LAMBERTON, being sworn on behalf of the plaintiff, and testifying, among other things, was asked the following question: Have you made any estimate or examination so as to enable you to state about how many more acres of land the Winona and St. Peter Railroad Company would have received in the last three ranges (29, 30, and 31) had it received all the lands within fifteen miles of its road without division with the St. Paul and Sioux City Company?

To which *which* the defendant's counsel interposed the following objection: Objected to, as incompetent and immaterial. Incompetent in any event, without a statement as to the whole lands that would be affected by the rule referred to east of range 32; which objection was overruled, and the witness answered:

I made a brief examination, and would estimate the number of acres at from 35,000 to 40,000. I did not foot up the figures accurately. I made an estimate of the lands. The Winona and St. Peter Railroad Company would have received, had it taken all within the fifteen-mile limits of its line of road, it would have received from 35 to 40 thousand acres more than it in fact received.

134 To which testimony, and each and every part thereof, the defendants objected, as incompetent, immaterial, and irrelevant. Said objections were overruled, and exceptions then and there noted for defendants.

The plaintiff offered a map showing the dates of surveys made to locate its line of road through ranges 29, 30, and 31, as foflows:

Range 29—June 12, 13, & 22, 1857.

Range 30—June 12, 15, 1857.

Range 31—June 15, 17, and 18, 1857.

As approved by endorsements written on the line of survey through said ranges, and which dates had been verified by the parol testimony of the engineer by whom such survey had been made. (The said map being one made from surveys in the field by the engineers and employers of the Transit Railroad Company, and authenticated, as on file in the State land offices, and in the General Land Office at Washington.)

To which evidence the defendants objected, as incompetent, immaterial, irrelevant, and because confined to a small part only of plaintiff's line of road. Said court overruled the objections, received the evidence, and noted exceptions thereto for defendants.

135 HORACE THOMPSON was sworn as a witness on behalf of defendants, and having testified, among other things, that he was president of the defendant's company in spring of 1864; that he prepared copy of map to be made showing location of road by the Southern Minn. Railroad Company in 1858, and neither he, as president of the company, nor the defendants company, to his knowledge, had done any act intended to change said prior location,

was asked on cross-examination by the plaintiff's counsel the following question: Did not your company determine not to build its road beyond St. James, in range 31, in a westerly or southwesterly direction?

To which defendants objected, as incompetent, immaterial, irrelevant, and not proper cross-examination, and as inadmissible under the terms of the written stipulation in evidence and hereinafter set forth. Said objections were overruled, and exceptions noted for defendants.

Answer. The defendant company did determine not to construct its road beyond St. James, and it has not been constructed beyond St. James by that company.

The stipulation referred to is the following:

Exhibit marked Stipulations "A" and "B" attached hereto
136 and made part hereof.

And plaintiff introduced evidence which was objected to as incompetent and immaterial and irrelevant, and because the subject-matter was *res adjudicata*, by def'ts' counsel, tending to prove the particular steps taken to survey and locate a line of road west of range 31, and which was offered and admitted by the court for the purpose of showing that the line of location of said road, as claimed by defendant, had never been legally, or properly, or in fact established or definitely fixed; and the same was considered by the court in his findings of fact in that behalf, as set forth in his decision and conclusions of fact herein; said objections were overruled by said court, and exceptions thereto duly noted for def't.

Said defendants introduced evidence tending to show that Horace Thompson, then president of the defendant company, in the spring of 1864, caused a map to be made, which was a copy of the map filed
in the Land Department at Washington in April, 1859, as far
137 as the west line of range 29, and from that point a line (which has not been surveyed) was drawn on such map southwesterly in the direction of Sioux City, Iowa, to the south line of the State. Such map President Thompson, on the 21st day of June, 1864, forwarded to the Governor of the State of Minnesota, with a *a* letter addressed to him, which is as follows:

OFFICE OF THE MINNESOTA VALLEY R. R. CO.,
SAINT PAUL, *June* 21, 1864.

GOVERNOR STEPHEN MILLER, *Saint Paul.*

MY DEAR SIR: The accompanying map will indicate the line of the Minnesota Valley railroad with the 6, 15, & 20-miles limits of the two Congressional land grants. The road has been located to a point some twenty miles, more or less, beyond Mankato, as indicated by certified maps filed in the Land Office at Washington. Beyond that point no permanent location has been made. The preliminary map accompanying will designate the proposed route,

and is thought to be substantially correct. The company
138 are about to make a permanent location from Mankato to the State line, in the direction of Sioux City, the proposed terminus of the line, and will be ready to file location maps the coming fall.

Owing to Indian rumors and other causes, — is impossible for the company to complete the location before October of the present year. In the meantime the road, already shorn of most of its lands between St. Paul and Mankato, is loosing rapidly beyond that point where the deficiency must be made up, and also within the additional limits of 15 & 20 miles this side.

Speculators, in anticipation of the road, are rapidly locating college scrip and land warrants on the most valuable lands. It is of *vital interests* to the road, and consequently to the State, that the remaining lands should be *reserved* along the whole line, and within all the limits, in order that the full complement of 10 sections to the mile may be obtained.

The company will be ready to file certified maps of the whole road in *October*.

139 To preserve the lands in the *meantime*, we respectfully suggest that your excellency will file this preliminary map at the General Land Office, and in behalf of the State request the Commissioner to withdraw *temporarily* from sale or pre-emption *the lands along the whole line of the road*, and so notify the local land officers *with the least possible delay*.

I am, very respectfully, yours,

HORACE THOMPSON,
Pres't Minn. Valley R. R. Co.

On the following day the Governor of the State forwarded such letter and map to the Commissioner of the General Land Office, at Washington, accompanied with a letter which is as follows:

STATE OF MINNESOTA, EXECUTIVE DEPARTMENT,
ST. PAUL, *June* 22, 1864.

Hon. J. M. EDMUNDS,
Com'r Gen'r'l Land Office, Washington, D. C.

SIR: I respectfully enclose a communication of the 21st inst. from Horace Thompson, Esq., president of the Minn. Valley Rail-
140 road Company, together with a map therein referred to.

I respectfully ask that the said preliminary map may be filed on behalf of the State of Minnesota, and request that the lands therein indicated be temporarily withdrawn along the whole line of the road, and the local land officers be promptly notified to that effect.

I am, resp'y, your ob't serv't,

STEPHEN MILLER,
Governor Minn.

Pursuant to such letters and maps and by direction of the Secre-

tary of the Interior, the Commissioner of the General Land Office on the 7th day of July, 1864, forwarded to the register & receiver of the U. S. land office at St. Peter, Minneapolis, and Winnebago City the following letter:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *July* 7, 1864.

REGISTER AND RECEIVER, *St. Peter, Minn.*

GENTLEMEN: By act approved May 12, 1864, 7th section, a grant of additional lands was made to Minnesota to aid in the con-
141 struction of the railroad from St. Paul and St. Anthony *via* Minneapolis to the southern boundary of the Territory, known as the Southern Minnesota.

The Secretary of the Interior having ordered, under date of the 2nd inst., a withdrawal of lands on account of said road:

You will, therefore, suspend from settlement, location, and sale a body of lands, about twenty miles in width, as indicated on the enclosed diagram, "B."

Acknowledge the date of the receipt of this.

Very respectfully, your ob't servant,

J. M. EDMUNDS,
Commissioner.

The same day the Commissioner of the General Land Office addressed to the Governor of the State a letter in the words and figures following:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *July* 7, 1864.

His Excellency the Governor of Minnesota, St. Paul.

SIR: Your letter of the 22nd inst., enclosing a letter from the president of the Minnesota Valley (Southern Minnesota) rail-
142 road, with a map for a withdraw- of lands for said road, was referred to the Secretary of the Interior. He having ordered the withdraw-, the necessary instructions have this day been issued to the register and receiver at Minneapolis, St. Peter, and Win-ebago City.

Very resp't'y, your ob't servant,

J. M. EDMUNDS,
Commissioner.

Said register and receiver at St. Peter and Win-ebago City, under date of July 15th, 1864, and July 20th, 1864, respectively, acknowledged the receipt of said letter and diagram "B" addressed to them, and complied with the direction therein contained.

The said evidence as to said map, the orders of the Department of the Interior, and the action of the local officers in compliance therewith, as set forth herein, were offered in evidence by said defendants, and received subject to plaintiff's objection thereto, but were finally rejected and excluded by the court, and not considered in making up said findings of fact therein and exception thereto,

and to the rejection of said evidence and every part thereof are allowed and noted for defendant herein.

143 And further to maintain said issues on its part said plaintiff introduced evidence tending to support the allegations in its said complaint as last amended as to the construction of the railroad west of St. James by the Sioux City and St. Paul Railroad Company, all [of] which was objected to by said defendants as immaterial and irrelevant, and exceptions thereto duly noted for said defendants; and testimony was offered by said plaintiff and received upon the issues joined as to the former practice of the Interior Department upon the adjustment of conflicting railroad grants, and upon the alleged representations of the officers and agents of the defendant company as to the construction of its road beyond and west of St. James, to all which and every part thereof said defendants objected as immaterial and irrelevant, but said court overruled said objections, and noted exceptions thereto for defendant.

Order Allowing Amendment to Complaint, and Striking Out part of Stipulation "B," Referred to in Foregoing Bill of Exceptions.

District Court, Blue Earth County.

THE WINONA & ST. PETER RAILROAD COMPANY
144 *vs.*
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY.

Pending the trial of the above-entitled action, the plaintiff having rested his case, and the case being with the defendants, and the trial progressing on the fourth day of October, 1875, on the affidavit of Thomas Wilson and H. W. Lamberton, and on the verified complaint and answer referred to in the affidavit of said Wilson, the plaintiff moved the court to allow and order the following amendments, viz: Amend section sixteen of the amended complaint so as to read as follows, viz:

That the def't, The St. Paul and Sioux City Railroad Company,
145 claims to be by its charter and by the laws of the Territory and State of Minnesota authorized to survey, locate, and build a line of railroad from St. Paul and from St. Anthony *via* Minneapolis to a point of junction at Shakopee to the south boundary of the Territory or State of Minnesota, in the direction of the mouth of the Big Sioux river, and the said railroad company has built and put into operation a line of railroad from St. Paul to a point on the east line of range thirty-two, (at St. James,) and there is a line of railroad built from said St. James, on the east line of range thirty-two, by the Sioux City and St. Paul Railroad Company (a corporation organized under the laws of the State of Iowa) to a point on the south boundary of the State about forty miles east of the western line of said State.

2. Amend subdivision 17th. of said amended complaint to read as follows:

That the line of plaintiff's road, as marked on map Exhibit "A,"

hereto attached, is correctly laid down and delineated, and said map correctly shows the sections and subdivision of sections and the towns and ranges on and over which the plaintiff's said road
146 is located and built, and the line of defendant's road to St. James is correctly laid down and delineated on said map, and the line of the said Sioux City and St. Paul railroad from said St. James southwesterly to the Iowa line as aforesaid; and the said map correctly shows the sections and subdivisions of sections and the towns and ranges on and over which the defendant's road from St. Paul to St. James and the road of the Sioux City and St. Paul Railroad Company west of St. James are located and built.

3. Amend subdivision 18 of said amended complaint, as follows, viz:

After the words "St. Paul and Sioux City Railroad Company, as the same was actually constructed," add and insert the following words, viz:

"From St. Paul to St. James and the line of road of the said Sioux City and St. Paul Railroad Company, as the same was constructed from St. James to the south line of the State as aforesaid."

4. Amend subdivision 19 of said amended complaint as follows, viz:

Strike out the following words: "But, on the contrary, adopted another, to wit, the one on which its road is now built, as laid
147 down on said map, and which line terminates on the south line of the State of Minnesota, about forty miles east of the western boundary of said State."

5. Amend section or subdivision twenty-three (23) of the said amended complaint so as to read as follows, viz:

That of the lands in Schedule "B," hereto attached, all those not included in Schedule "C" or "D," hereto attached, lie within the six-mile limits of the plaintiff's road, and all those included in Schedule "C" lie outside of the six and within the ten-mile limits, and all those in Schedule "D" outside of the ten-mile limits of plaintiff's road, and none of said lands lie outside of or beyond the fifteen-mile limits of plaintiff's road or within ten miles of the road of the defendant, The St. Paul and Sioux City Railroad Company, or of the road of said Sioux City and St. Paul Railway Company, and all of those described in *in* Schedule E lie more than fifteen and those described in Schedule P more than twenty miles from the road of either of the last-named companies; and all of the lands in Schedule B which lie within the six-mile limits of plaintiff's road, and all of said lands which lie outside of the six-mile limits of the plaintiff's road, are more than fifteen miles from the road of either of the other
148 companies named in this section.

6. Amend subdivision twenty-five of the said amended complaint as follows, viz:

After the words "that at different points between range twenty-six and range," strike out the word "forty" and insert the words "thirty-two," (32.)

7. After subdivision twenty-nine and before subdivision 30 of the amended complaint insert the following allegation, viz: That at a contest between this plaintiff and this defendant for the lands in controversy in this suit, had before the Secretary of the Interior of the United States in the year 1872 and 1873, the officers, agents, and attorneys of the defendant positively represented, stated, and affirmed that it (defendant) had located and constructed its road along and past the lands in controversy long prior to the location and construction of the plaintiff's line of road past such lands; and the
149 officers, agents, and attorneys of the plaintiff, relying upon and believing such statements and representations, tacitly assented to their truth; and the Secretary of the Interior decided the controversy in favor of the defendants on the ground of such prior construction, as well as prior location; that such representations were made by the defendant's officers, attorneys, and agents knowing their falsity, and with the intention to deceive and mislead the agents and attorneys of the plaintiff and the Secretary of the Interior; and such misrepresentations did mislead and deceive said Secretary of the Interior and the said agents and attorneys of plaintiff."

That subdivision fifth of Stipulation "B" be amended so as to read as follows:

That the defendant, The St. Paul and Sioux City Railroad Company, has constructed and completed, and did within the times and in the manners specified and required by the laws of the United States and of the Territory and State of Minnesota survey and lo-
150 cate and, when such survey and location had not been previously made as aforesaid, *and* construct and complete a line of railroad from St. Paul through the county of Scott and the points designated in the third chapter of the act of the Territory of Minnesota, approved May 22d, 1867, to the east line of range thirty-two (32) in the direction of the mouth of the Big Sioux river, and long before the commencement of this action in all respects did comply with and conform to the provision, conditions, and requirements of the second acts of Congress granting lands to aid in the building of its said road, (and that the said Sioux City and St. Paul Railway Company before the commencement of this action did survey and locate, where such survey and location had not been previously made, and construct and complete a line of railroad from said St. James to the southern boundary of the State in the direction of the mouth of the Big Sioux river.)

Or that the said subdivision of said stipulation may be
151 vacated and the plaintiff adjudged not to be bound thereby, or that it may be modified in accordance with the facts proven in the case.

WILSON AND TAYLOR,
Attorneys for Plaintiffs.

The above motion having been heard on the 6th day of October, A. D. 1875, after reading the many papers above referred to, and the affidavits of E. D. Palmer and E. F. Drake, in opposition to the

motion, and after hearing the arguments of counsel for the respective parties—

Ordered, That each and all of the amendments of the complaint prayed for be allowed, and that subdivisions "Fifth" of said Stipulation "B" be amended as follows, viz:

In the words and figures above, or in the election, or at the option of the defendant in the above words and figures, exclusive of the words and figures inclosed in parenthesis ( ), or at the election or option of the defendant, that the plaintiff be relieved from
152 said subdivisions, and that the same be vacated. It is further ordered, that a copy of the above motion and of the order be served on the defendants' attorney, and that he have ten days to elect whether said subdivision Fifth of Stipulation "B" be amended so as to read as above set out, including the words inclosed in brackets, or whether said subdivision be amended so as to read as aforesaid, excluding said words inclosed in brackets, or whether the plaintiff shall be relieved therefrom, and the same vacated.

And if the defendants' attorney fail or refuse so to elect or to serve a notice of such election on plaintiff's attorney within ten days after the service of a copy of this order upon him, then and in that event it is ordered that said stipulation shall be so amended as to read as aforesaid, excluding therefrom the words included in brackets as aforesaid.

(Signed) D. A. DICKENSON,
District Judge.

Stipulation "B," referred to in foregoing Bill of Exceptions, and made part thereof.

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, 6th Judicial District.

153 THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY.

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, 6th Judicial District.

THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY
against
THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated and admitted in each of the above-entitled actions—

First. That the Winona and St. Peter Railroad Company and the St. Paul and Sioux City Railroad Company are and each of them is, a corporation duly created and organized by and under the laws of the State.

Second. That the matters and facts alleged in subdivisions seven

(7), eleven (11), twelve (12), and thirteen (13) of the amended complaint in the first above-entitled action are true.

154 Third. That the matters and facts alleged in subdivision fourteen (14) of said amended complaint, down to and including the word "latitude" in line eight (8) of said subdivision, are true.

Fourth. That the matters and facts alleged in subdivisions twenty-five (25), twenty-six (26), twenty-seven (27), thirty-three (33), and thirty-four (34) of the answer to the amended complaint in the first above-entitled action are true.

Fifth. That the matters and facts alleged in subdivision thirty-five (35) of said answer, down to and including the words "building of its said road," are true.

Sixth. That any deposition, stipulation, or other item of evidence stipulated for or received or receivable in one of the above-entitled actions shall, so far as relevant, be receivable and received as evidence in the other.

155 Seventh. It is admitted that the map of location between ranges 31 & 37 of the W. & St. P. Railroad, a certified copy of which will be put in evidence, was forwarded to the General Land Office at Washington by the register at the U. S. Land Office, at St. Peter, Minn., on April 15th, 1867.

That on April 18th, 1864, said map was returned from said General Land Office to said office at St. Peter, that the certificate of the Governor and the dates of the field work from point to point might be added, and with the further reargument that said map should be received from the Governor.

That on August 3d, 1864, said map was again received at said General Land Office from the Governor, and with his certificate and said dates added, and with a renewal of the request that the lands be withdrawn.

That on August 10th, 1867, instructions of withdrawal of lands from market on said map, accompanied by a diagram, were
156 sent to the local land office at St. Peter by Commissioner of General Land Office.

Eighth. That the Government survey of the following townships was approved on the dates hereinafter designated, viz:

Town	106,	range	32	September 20, 1858.
"	107,	"	32	" 20, 1858.
"	106,	"	33	" 20, 1858.
"	106,	"	34	November 6, 1858.
"	105,	"	35	January 11, 1859.
"	106,	"	35	December 14, 1858.
"	105,	"	36	" 19, 1859.
"	106,	"	36	" 19, 1859.
"	105,	"	37	November 22, 1859.
"	104,	"	38	March 17, 1859.
"	105,	"	38	November 22, 1859.
"	109,	"	32	October 7, 1858.
"	110,	"	32	September 25, 1858.

	Town 108,	range	33	November 26, 1858.
	" 109,	"	33	January 15, 1859.
	" 108,	"	34	November 6, 1858.
	" 109,	"	34	October 7, 1858.
	" 108,	"	35	November 16, 1858.
	" 109,	"	35	November 6, 1858.
	" 108,	"	36	December 24, 1859.
	" 109,	"	36	November 6, 1858.
	" 108,	"	37	December 24, 1859.
	" 109,	"	37	December 10, 1859.
	" 108,	"	38	December 24, 1859.
157	" 109,	"	38	December 10, 1859.
	" 108,	"	39	December 17, 1861.
	" 109,	"	39	August 21, 1867.
	" 109,	"	40	October 1, 1867.
	" 110,	"	40	October, 16, 1867.

Tenth. It is admitted that the above is a true abstract from the records of the U. S. surveyor general's office at St. Paul, Minn., and that the facts therein stated, if competent evidence, shall be considered as proven by the above, including caption.

Eleventh. That each and every item of evidence stipulated for in either of the stipulations between the parties to the above-entitled action may be objected to on the trial, as immaterial and irrelevant and as incompetent, except as to form and mode of proof, and except as above stipulated.

THOMAS WILSON,
Att'y for Winona & St. P. R. R. Co.
E. C. PALMER,
Att'y for St. Paul & Sioux City R. R. Co.

158 *Stipulation "A," referred to in foregoing Bill of Exceptions and made part thereof.*

District Court, Watonwan County, Venue changed to Blue Earth County, Minnesota.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY.

District Court, Cottonwood County, Minn., Venue changed to Blue Earth County, Minn.

THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY
against
THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated in the above-entitled actions as follows viz:

1. That the matters and facts alleged in subdivisions two (2), eight (8), nine (9), and ten (10), in the amended complaint in the first above-entitled action are true as therein stated.

2. That the matters and facts alleged in subdivision eleven
159 (11) of said amended complaint in said first above-entitled action, down to and including the words "which the said Transit Railroad Company had, or owned, or possessed," are admitted.

3. That the allegations of subdivision fifteen (15) of said amended complaint in said first above-entitled action, down to the words "and by the location and construction of its line of railroad as aforesaid," are admitted.

4. That the matters and facts alleged in subdivision eighteen (18), twenty-two (22), twenty-three (23), and twenty-four (24) of the answer to said amended complaint in said first above-entitled action are true as therein stated.

5. That the allegations of subdivision twenty-five of the answer to the amended complaint in the first above-entitled action, down to and including the words "held the same without merger or
160 extinguishment," are admitted.

6. That copies of any letters, order, affidavit, map, or plat, or of any other paper or writing, or of the record thereof on file or recorded in the General Land Office at Washington, duly certified by the Commissioner or Acting Commissioner of the General Land Office, shall be received in evidence in either of the above-entitled actions, on the trial thereof, whenever the originals would be competent, material, or relevant evidence, and with the same force and effect of the originals, subject to any objections which might be made to the originals if offered, and the certificate of such Commissioner or Acting Commissioner of the date of the filing of any such instrument or of the record thereof shall be *prima facie* evidence of the date of such filing or record.

7. That copies of any letter, order, affidavit, map, plat, or other paper or writing, or of the record thereof, on file or recorded in the
161 office of the Governor, secretary of State, State auditor, or State land commissioner of Minnesota, duly certified by the proper officer, shall be received in evidence in either of the above-entitled actions, on the trial thereof, whenever the originals would be competent, material, or relevant evidence, and with the same force and effect of the originals, subject to any objections which might be made to the originals if offered, and the certificate of such proper officer of the date of filing of any such instrument or of the record thereof shall be *prima facie* evidence of the date of such filing or record.

8. That the certificate of the Commissioner or Acting Commissioner of the General Land Office of the date of the withdrawal of any lands from market for either of said railroad companies, or of the date of fixing the limit of the land grant to either of said roads shall be *prima facie* evidence of such date: provided, that the
162 said Commissioner or Acting Commissioner shall attach to his said certificate a copy duly certified of any letter or letters, order or orders withdrawing such lands, and of any map or maps, fixing or defining such limits, either partly reserving the right to

object to the competency, materiality, or relevancy of such evidence, or any part thereof.

9. That before the line of road of either of the Winona and St. Peter Railroad Company or of the St Paul and Sioux City Railroad Company was definitely located or fixed to any point between the western line of range 31 and the western line of range 40, the right of pre-emption had attached to, and the U. S. had sold and disposed of, so many of the lands lying within 20 miles of each of said roads that the remaining alternate sections within 20 miles of either were insufficient to make up the number of acres to which either
163 road was or is entitled under the laws of the United States, or of Minnesota, on account of the building of its road to said western line of range 40; and all of the lands in controversy in both of the above-entitled suits would not make up such deficiency to either road.

10. That any matter, allegation, or item of evidence stipulated for as aforesaid, shall be received and receivable in the second above-entitled action, so far as relevant thereto and therein, and the foregoing stipulation shall extend and apply to the complaint and answer in said last-named action upon the trial thereof.

WILSON AND TAYLOR,
Att'ys for Winona & St. P. R. R. Co.
E. C. PALMER,
Att'y for St. Paul and Sioux City R. R. Co.

The foregoing bill of exceptions having been by me examined and found conformable to the truth is hereby allowed, and
164 the same is hereby signed and made part of the record in said cause.

Dated Jan'y 3d, 1879.

(Signed) D. A. DICKENSON,
Judge District Court, Sixth Judicial District.

Second Bill of Exceptions.

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, 6th Judicial District.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. Scott, Charles Schaffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow.

Be it remembered that after the making and filing of the findings of the court, conclusions of law, and order for judgment in this action, the defendant having proposed a bill of exceptions, the plaintiff having offered amendments thereto, and the same having been settled before the court, but not having been engrossed or signed,
165 the plaintiff also having proposed a bill of exceptions, and the defendant having offered amendments thereto, and the

court being engaged in the settlement of such bill of exceptions proposed on the part of the plaintiff, and having under consideration matter relating to the selection by the defendant of the lands in controversy, which (selection) had been found by the court to have been made, the counsel for the respective parties being before the court, and it having been suggested on the part of the plaintiff that in making its findings of fact in the particular above referred to the court had, by mistake, inadvertance, and oversight, erred, and that the indisputed evidence in the case should that the lands in controversy outside of the plaintiff's six-mile limits had been selected by the plaintiff before the commencement of this action, and that there was no evidence that any of said lands had been at any time selected by the defendant, The St. Paul and Sioux City Company;

That in the plaintiff's said bill of exceptions, among other things, the plaintiff's counsel set out what was by him claimed, and
166 before the court at the time aforesaid urged as being all the evidence given on the trial touching or relating to the selection by either plaintiff or the defendant company or by the State for either of the lands in controversy outside of and not within the six-mile or granted limits of the plaintiff's line of road, which evidence plaintiff claimed showed conclusively that all the lands in controversy in this action (outside of the pl'ff's six-mile or granted limits) had been selected by the plaintiffs, and also claimed that there was no evidence showing that any of said lands had been selected by the def'ts company, and in his proposed bill of exceptions the plaintiff's counsel asked the court to certify that the evidence offered on the trial on that point or touching that subject-matter:

That the court thereupon intimated and stated that in his opinion the proper practice in such case was for the plaintiff to move to amend the finding or decision, and that that seemed to be a proper case for a motion to amend the findings as aforesaid: that the plaintiff's counsel then and there stated that he concurred and acquiesced in the suggestion of the court as aforesaid, and applied to the
167 court then and there for an order permitting the plaintiffs to make the motion aforesaid, and the court then and there made an order in the following words and figures:

STATE OF MINNESOTA, *Blue Earth County:*

District Court.

THE WINONA AND ST. PETER RAILROAD COMPANY
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY *et al.*

This case having been before me on the 29th day of August, A. D. 1878, on the settlement of the plaintiff's bill of exceptions, the attorneys of the respective parties being present, the plaintiff's attorney having called to the attention of the court and the opposite counsel certain evidence in the case, which it was claimed had been

overlooked and not considered in the decision and findings heretofore made in this case, on motion of the plaintiff's attorney it was ordered that the plaintiff have leave to move the court, on the 12th day of September next, at 9 o'clock a. m., or as soon thereafter as counsel can be heard, at my chambers, in the city of Mankato,
168 that such decision and findings be amended in this respect, viz: Alleging and finding specifically and particularly that none of the lands in controversy in this action which lie, outside of the six-mile limits of the plaintiff's line of road were or have been selected by the defendant company or by the State or any one for it, and that said lands were and had been long prior to the commencement of this action selected by the plaintiff and by the State of Minnesota for it, and, as a matter of law, that the plaintiff is entitled to all of said lands, and that the defendants' company is not entitled to said lands or any part or parcel thereof.

And it is further ordered that the further steps in the case by way of setting said bill of exceptions or otherwise be stayed until the hearing of the motion aforesaid.

Dated August 29th, 1878. D. A. DICKINSON, *Judge.*

And defendants' counsel then and there admitted due service of a copy of such order.

That thereafter, on the 12th day of Sept., 1878, said plaintiff's counsel served on def'ts' counsel a notice of motion in the words and figures following, viz:

Copy of Notice of Motion.

169 STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth Judicial District.

THE WINONA & ST. PETER RAILROAD COMPANY
vs.
THE ST. PAUL & SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow.

SIR: You will please take notice that on the affidavit of Thomas Wilson, and on the order made on the 29th day of August, A. D. 1878, copies of which are herewith served upon you, the plaintiff will make a motion before the Hon. D. A. Dickinson, judge of this court, at his chambers, in the city of Mankato, on the 12th day of September, A. D. 1878, at 9 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, that the court amend the finding and decision in the above-entitled action as follows, viz: So as to set out and find specifically (if the court finds the facts to be so shown and proven by the unquestioned evidence in the case) that the plaintiff, by its agents appointed and approved by the State for
170 that purpose, did, on the 23d day of May, A. D. 1872, select all the lands in controversy in the above-entitled action outside of the six-mile or granted limits of the grant to plaintiff, and

pay to the register and receiver of the local land office the fees required to be paid on such selection by the laws of the United States and by the orders and regulations of the Land Department of the U. S., and that the defendant company has not, nor has the State or any one for it, selected the said lands or any of them, or paid the fees required to be paid on such selection.

And that the court, as a part of its finding, direct, find, and set out that the several matters and facts stipulated and agreed to and set out in each and all of the subdivisions of Stipulations "A" and "B" (which have been signed by the attorneys of the parties herein and served on the defendants' attorney, and are part of the files of this case) are true, as a matter of fact, as in said stipulations stated.

And that the court amend its findings and decision so as to find and decide, as a matter of law, that the plaintiff is the owner
171 of and entitled to a deed from the Governor of the State of all the lands in controversy which lie outside of its six-mile or granted limits, as well as all the lands in controversy within such six-mile or granted limits.

And that, in case the findings are changed as aforesaid, the defendants' attorney may, within 20 days, withdraw or amend his bill of exceptions in the case, or, at his option, propose a new bill of exceptions, so as to cover the matters included in said proposed amendments to the findings, and for such other and further relief as may be just.

Winona, Sept. 4, 1878.

THOMAS WILSON,
Plaintiff's Attorney.

To Hon. E. C. PALMER,
Attorney for Defendants.

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, 6th Judicial District.

THE WINONA AND ST. PETER RAILROAD COMPANY
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS
172 A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow.

STATE OF MINNESOTA, } ss:
County of Winona, }

Thomas Wilson, having been first duly sworn, doth depose and say *and say:* That heretofore a decision was made and filed in the above-entitled action, and heretofore the plaintiff prepared a proposed bill of exceptions in this case, which was duly served on the defendants' attorney, who proposed certain amendments thereto; and the same was, on the 29th day of August last, presented to the Hon. D. A. Dickinson, judge of said court, for settlement and allowance, the attorneys for the plaintiffs and defendants respectively being present.

That in said proposed bill of exceptions, among other things, the plaintiff's counsel set out (as he claimed) all the evidence given on the trial touching or relating to the selection by either the plaintiff or the defendant company, or by the State for either, of the lands in controversy outside of and not within the six-mile or granted limits of the plaintiff's land grant or line of road; which evidence showed conclusively (as the plaintiff's counsel claimed) that all of the lands in controversy in this action had been, prior to the commence-
173 ment of this action, selected by this plaintiff, and there was no evidence showing that any of said lands had been selected by the defendant company; and in his exceptions the plaintiff asked the court to certify that the evidence so set out by this proposed bill was all the evidence offered on that point or touching that subject-matter.

And the defendant proposed as an amendment to the said proposed bill of exceptions that that portion thereof aforesaid should be stricken out and not allowed, and stated on his argument on the said 29th day of August aforesaid in opposition to the allowance of that part of said bill of exceptions; that the same should not be allowed, because it was in contradiction of the finding of the court, and that the plaintiff's remedy and proper course in such case was to apply to the court to change or modify the finding in the respect wherein it was erroneous. That the court thereupon intimated and stated that in his opinion the proper practice was if by mistake or oversight he had, as was claimed, overlooked any evidence, and thus made an erroneous decision or finding, for the plaintiff to move to amend the finding or decision. And the court also, at the same time, intimated
174 and stated that this seemed to be a proper case for a motion to amend the finding as aforesaid; but the court did not say or decide that his finding was, in the respect referred to, or in any respect, erroneous, but intimated and said that the question would be properly considered and decided on the motion to amend the finding as aforesaid; that this affidavit (plaintiff's counsel) then and there acquiesced and concurred in this intimation and suggestion of the defendant's counsel and the court as aforesaid, and applied to the court then and there for an order permitting the plaintiffs to make the motion aforesaid; and the court thereupon made an order, in the following words and figures (order set forth aforesaid in this bill of exceptions).

Affiant further says that he verily believes that the court in its findings aforesaid, by oversight, mistake, and inadvertence, fell into the error aforesaid; that the evidence in the case shows beyond any doubt that the findings are in the respect aforesaid contrary to the evidence and erroneous, and that the undisputed evidence in
175 the case shows that all the lands in controversy in this action outside of the pl'ff's six-mile or granted limits were selected and the land office fees therefor paid by the pl'ff on or about the 23d day of May, A. D. 1872, and that was no evidence tending to show any selection of such lands by the defendant company.

Affiant further says that after issue joined in this action and before the trial was entered upon the plaintiff and defendant, by their

respective attorneys, entered into and signed two certain stipulations, marked respectively ("A" & "B,") in and by which stipulations certain facts were admitted and stipulated to be true, which stipulations are part of the files and records of this case.

That the court in its finding aforesaid has not found to be true all the facts and matters admitted and stipulated to be true in said stipulations, which omissions, as affiant believes, were by inadvertance and oversight.

That prior to the 29th day of August last the defendant
176 had proposed a bill of exceptions in the case, to which the plaintiff's counsel had proposed certain amendments, and the same had been presented to the court for settlement, and the counsel for the respective parties heard therein, and the court had settled the same; but the same had not, before the 29th day of August last, and has not, been engrossed or signed by the court.

THOMAS WILSON.

Sworn and subscribed to before me, this 4th day of Sept., 1878.
[SEAL.] WM. A. ALLEN,
Notary Public.

And on the day named in said notice said defendants' counsel appeared and objected preliminarily to the hearing and granting thereof upon grounds appearing and set forth in the minutes of the court then and there, and were as follows:

1st. Leave having been granted the pl'ff's counsel to make bill of exceptions of which he availed himself, and said bill of
177 exceptions having been proposed and the settlement of the same entered upon, it is to- late for him to move to correct said decision filed in said action or any portion of the same.

2d. That leave having been granted to make suggestions as to the findings of fact and law embraced in the decision before said decision was filed, of which pl'ff's counsel availed himself by suggesting, among other things, that the court correct its findings in the respects now embraced in this motion, said motion should not now be entertained or heard.

3d. That said motion as made in the papers served on def'ts' counsel does not conform to the order dated Aug. 29, 1878.

4th. That other matters are embraced in said motion papers which are not referred to or covered by the order of Aug. 29, 1878.

5th. Because the matters sought to be corrected are immaterial and irrelevant.

But said court overruled said objections, to which ruling
178 said defendant then and there duly excepted, and their exceptions were allowed and noted by the court. Said motion was thereupon heard, and it appearing to the court that in making its original finding of facts herein the court had overlooked and hence failed to consider certain important evidence in the case relating to such selection as aforesaid, it was considered by the court that such motion ought to be, and was, granted, and new and additional findings of fact made as set forth in the decision filed by said

court, hereinafter referred to and made part hereof; to which, and every part thereof, said def'ts then and there excepted, and such exception was allowed and noted.

Said plaintiff having in said notice of motion notified def'ts that motion would be made that the court find specifically as facts certain matters which appeared in Stipulations "A" & "B," at-
179 tached to the former bill of exceptions, referred to by the court as settled, said def'ts further specifically objected that said matters could not be brought before the court on the hearing granted under the order dated Aug. 29, 1878, and that the motion should be confined to the matters specifically pointed out in that order; but the court overruled said objections and heard and granted said motion, and made findings upon and concerning said matters, as appears from his decision filed in said cause under date of Oct. 10th, 1878; to all and every part of which, and to the hearing of said matters, def'ts duly excepted, and their exceptions was allowed and noted by the court. Said court further found as facts certain matters relative to the withdrawal of lands by the Secretary of the Interior along the located line of def'ts' railroad in 1864, and, in that connection, found certain conclusions of law, all which
180 are set forth in his said decision of Oct. 10th, 1878, and made part hereof.

The only evidence received upon the trial sustaining such findings of fact and conclusions of law is hereinafter set forth or indicated.

The letters, Exhibits 36, 37, were offered in evidence by the plaintiffs, and under and against the objection and exception of the defendants. All the evidence above referred to had been introduced in said cause prior to the first decision filed by the court therein. Exhibit 113 was introduced in evidence by the defendants.

Ex. 36.

OFFICE OF THE MINNESOTA R. R. Co.,
SAINT PAUL, *June* 21, '64.

GOVERNOR STEPHEN MILLER, *Saint Paul.*

MY DEAR SIR: The accompanying map will indicate the line of the Minnesota Valley railroad, with the 6, 15, and 20-mile limits of the two Congressional land grants. The road has been located to a point some 20 miles, more or less, beyond Mankato, as
181 indicated by certified maps filed in the Land Office at Washington. Beyond that point no permanent location has been made.

The preliminary map accompanying will designate the proposed road, and is thought to be substantially correct.

The company are about to make a permanent location from Mankato to the State line in the direction of Sioux City, the proposed terminus of the line, and will be ready to file location maps the coming fall. Owing to Indian rumors and other causes it is impossible for the company to complete the location before October of the present year.

In the meantime the road, already shorn of most of its lands between St. Paul and Mankato, is losing rapidly beyond that point where the deficiency must be made up, and also within the additional limits of 15 and 20 miles this side.

182 *Speculation*, in anticipation of the road, are rapidly locating college scrip and land warrants on the most valuable lands.

It is of *vital* interest to the road, and consequently to the State, that the remaining lands should be reserved along the whole line and within *all* the limits, in order that the full complement of 10 sections to the mile may be obtained.

The company will be ready to file certified maps of the whole road in *October*. To preserve the lands in the meantime we respectfully suggest that your Excellency will file this preliminary map at the General Land Office, and in behalf of the State request the Commissioner to withdraw temporarily from sale or pre-emption the lands *along the whole line of the road*, and so notify the local land officers with the *least possible delay*.

I am, very resp't'y,

183 HORACE THOMPSON.
Pres't Minn. Valley R. R. Co.

On the following day the Governor of the State, Stephen Miller, forwarded such letter and map to the Com'r of the General Land Office, at Washington, accompanied with a letter, which is in the words and figures following:

"EX. 37."

STATE OF MINNESOTA, EXECUTIVE DEPARTMENT,
ST. PAUL, *June* 22, 1864.

Hon. J. M. EDMUNDS,
Com'r Gen'l L'd Office, Washington, D. C.

SIR: I respectfully enclose a communication of the 21st inst. from Horace Thompson, Esq., president of the Minnesota Valley Railroad Company, together with a map therein referred to.

I respectfully ask that the said preliminary map may be filed on behalf of the State of Minnesota, and request that the lands therein indicated be temporarily withdrawn along the whole line of
184 the road, and the local land officers be promptly notified to that effect.

I am, resp't'y, your ob't serv't,

STEPHEN MILLER,
Governor Minn.

Pursuant to such letter and map, and by direction of the Secretary of the Interior, the Commissioner of the Gen'l Land Office, on the 7th day of July, 1864, forwarded to the register and receiver of the U. S. land offices at St. Peter, Minneapolis, and Winnebago City, the following letter:

E. 113.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *July 7th*, 1864.

Register and Receiver, St. Peter, Minn.

GENTLEMEN: By act approved May 11th, 1864, 7th section, a grant of additional lands was made to Minnesota to aid in the construction of the railroad from St. Paul and St. Anthony *via* Minneapolis to the southern boundary of the Territory known as the Southern Minnesota. The Secretary of the Interior having ordered, under
date of the 2d inst., a withdrawal of lands on account of said
185 said road, you will therefore suspend from settlement, location, and sale a body of lands about 20 miles in width, as indicated on the enclosed diagram "B."

Acknowledge the date of the receipt of this.

Very resp't'y, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

The same day the Commissioner of the General Land Office addressed to the Governor of the State a letter in the words and figures following:

Ex. 118.

To his Excellency, the Governor of Minnesota, St. Paul, Minn.

SIR: Your letter of the 22d inst. enclosing a letter from the president of the Minnesota Valley (Southern Minnesota) railroad, with a map for a withdrawal of lands for said road, was referred to the Secretary of the Interior. He having ordered the withdrawal, the
necessary instructions have, this day, been issued to the reg-
186 ister and receiver at Minneapolis, St. Peter, and Winnebago City.

Very resp't'y, your ob't serv't,

J. M. EDMUNDS,
Commissioner.

Said registers and receivers at St. Peter and Winnebago city, under date of July 15th, 1864, and July 20th, 1864, respectively acknowledged the receipt of said letter and diagram "B" addressed to them, and complied with the direction therein contained.

RUSSELL BLAKELY, called for plaintiff, testified as follows:

April 11, 1865, the date of this letter, (Ex. 28,) I think I was in Washington and called on the Commissioner of General Land Office.

Q. You were there to make inquiry in reference to the land grant of the *Souix* City road?

Ans. I was. I was then a director and stockholder, and member of the executive committee of the St. Paul and *Souix* City R. R. Co.

Ques. Were you at that time acting in behalf of any other railroad Co. then the St. P. & S. C. R. R. Co.?

Ans. I was not acting in behalf of any company, but as agent of the State. I was appointed agent of the State at my own instance.

Ques. To do what?

Ans. To make selection of lands within the 20-mile limits
187 of lands granted to him under act of May 12, 1864—lands granted to St. P. and S. C. road. I did not claim the right under -is appointment to act for any other road. The letter of appointment was filed with the Department at Washington perhaps about the date of the letter above referred to, or a little before.

Ques. You were acting solely in behalf of the St. P. and S. C. railroad?

A. I said I was acting for the State, to select lands granted for that road. The State did not pay my expenses.

Q. Were you not acting in the premises, in going and presenting the letter to the Department, for the St. P. and S. C. R. R. Co.?

A. That company never gave me any authority to make selections for it, either by word or written.

On cross-ex. witness said:

The additional grant to Minnesota for the St. P. and S. C. road was a new grant, the only one in the State, and I desired to know what would be the ruling of the Department in relation to it. I was going to Washington on my o-n individual business, and asked the Governor to give me this letter for Commissioner to make the inquiry I did. [I never exercised any authority under that letter except to make the inquiry I did.] I never filed any list of
188 lands or asked to have them certified to the State. This is the only act I ever did in the matter.

Redirect:

Q. Was it for the benefit of the State that you wanted to know the construction?

A. Only as agent (commissioner?) for the State. I supposed it was for the benefit of the State. I desired to know the construction. I think I did not do it for the benefit of the State. The State was only a trustee.

Wilson C. Brown, called for plaintiff, testified as follows:

I live at Winona; am in employment of pl'ff in the land department, and have been for 5 or 6 years—prior to which I was in land office at St. Peter, from April, 1864, to Feb'y, 1869. The New Ulm office was the St. Peter office removed. (Ex. 57 shown witness.) I first saw this in St. Peter land office while I was employed there as clerk. I am confident I saw it there. I remember also the date. I first saw it in land office. It was in July or August, 1864. I think it was in the latter month. I know Wilson Tibbetts. I
189 think I have seen it in land office at New Ulm. My business called me to that office for pl'ff two or three times a year. My business called me to look at maps, fixing limits of railroads. I am chief clerk of land department of pl'ff's road. I made or supervised

the selection of lands for that road. It was concerning that road that I was in the office at New Ulm.

After seeing this map at the land office at New Ulm I saw it in land office of pl'ff. I wrote to Nelson (Tilson?) Tibbetts for it at request of Mr. Lamberton, and he sent it. (Witness shown Ex. 81.) Have seen it before. Saw it in land office at St. Peter July 28th, 1865. A marginal note on the map enabled me to fix the date. It is in lower left-hand corner, and reads as follows: "Received July 28th, 1865." It is in my hand. I was clerk in office of register then. (Mr. Swift was register.) The practice of the office was to note time of receipt on the margin. This map came from commissioners of land office to register and receiver of land office
190 at St. Peter. I usually obtained the mail from the post office, and was authorized to do so, and to make such entries as this referred to, to wit: "Rec. July 28th, 1865."

Q. Was all the writing in ink now on the map on it when you received it from the General Land Office?

A. About the middle of left-hand margin the following figures: "10; M. W. & S. P. R." was not on it then, nor "6, M. M. V." in left-hand margin. "Present limits of Minn. Val. grant" were there when received. I notice nothing else that was not then on the map.

On cross-ex. the witness said:

The upper left-hand corner of the map Ex. 81 was not torn away when it was received. I know it came from General Land Office, because I recollect a letter accompanying it. That letter was put on file, as near as I can now recollect. It came here, being brought from our office in Winona. I think it was taken from the land office some time in 1866 or 1867, while I was there. Mr. Lamberton took it from the office at the time. It was a record in the
191 office. The register, Henry A. Swift, gave it to him. Mr. L. was then land commissioner of plaintiff's. He has been in land office of W. & St. P. R. Co. ever since, so far as I know. He has since I have been there. When such maps are rec'd at the local land office the time of receipt was (is?) entered on the map, and sometimes the entry was made on accompanying letter.

There was no reception book where the entries were made. There would be no receipt of the reception of the map after it was taken away, unless the entry on the letter. I said all the writing and figures, except those named, were on it at the time it was received. I did not refer to the lines. Not all the lines now on the map were on it then. When received the land limits were indicated in water-colors, and all the limit lines in black ink have been put on since it was received at land office.

The line of Minn. Val. R. R. from west line of R. 31 west-
192 ward in black line has been put on since. Also the line of pl'ff through R. 38 was subsequently added. I don't think Mr. Lamberton got any other map out of the office at that time. I was present when the map was taken from the office by him. I left the local land office in May, 1869; "Gov. Swift died in February,

1869." My official relation ceased with the death of Gov. Swift in February, but I had charge of the records of the office till May. Ex. 57 was received by pl'ff some time this spring.

Redirect ex :

The upper corner now gone from map Ex. 81 was blank when it was rec'd, except it had towns and sections delineated.

It was cut off for use in making a map, or something. We got short of paper.

The lines indicated in color were on when it was rec'd. When a plat is received at the local office from the General Land Office fixing limits of a road it is customary, and required, to enter such limits on a book of plats of the local office.

Recross-ex.

193 It may have drawn pencil lines on Ex. 57, but don't think I did. I think I know, from my knowledge of lines on map of this character, and of lines drawn on such maps, what this pencil line is intended to represent.

ABNER TIBBETTS sworn for plaintiff :

I live in Lake City ; have lived there since 1855 ; in 1864 was register in St. Peter land office.

Diagram marked Ex. 157 shown witness.

It resembles one I have seen at the office. I see my handwriting on back. Words "Rec'd Aug. 18, 1864," are in my hand. I judge it is the same plat received at St. P. land office from Com. Gen'l Land Office.

I judge, I should say it was rec'd at the date named. On rec't of such plats the date of rec't it is customary to put on map. We are so instructed to do.

The limits marked on maps were on when it was rec'd. All except the certificate of date of reception was on map when I rec'd it.

We always regarded it as a file in that office. I left the office in May, 1865, I think. John Kern was receiver then.

I cannot say whether that map was there when I left. I do not know how it got out of the office.

Ques. After map is once received and on file in office, can
194 it properly be removed therefrom under regulations of department?

A. It cannot.

Examination of Mr. TIBBETTS resumed :

I think I recollect that such a map was rec'd with limit lines on it, and from seeing my handwriting I think this is the one. The map was posted up where we saw it very often ; had occasion to refer to it, and was familiar to us.

I never delivered the map to any one, nor did any one else, to my knowledge.

Redirect:

I remember receiving a map like this, or this map, about that time. I think this is the map.

ABNER TIBBETTS, called by pl'ff, testified as follows:

I have seen this map Ex. 88 before in the St. Peter land office, and also afterwards at office in New Ulm.

My first term (as register) commenced in March, 1861. It was rec'd soon after that.

Q. I call your attention to a seam on this map between range 24 and 25. Explain, if you know, how or when the parts of the map on each side of it were placed together?

A. I found this map in the same condition it is now when
195 it came into my hands. I mean the parts on both sides this seam. From R. 12 to 31 it is my impression it was the same when it came into my hands, and is now, to west line of range 37. There is no break between 31 and 37, and I am confident it was not pieced up.

Q. Was this used as one of the records in the office?

A. It was as our guide in the office to determine pre-emption, homestead, and railroad divisions, lines, and limits.

When such maps came to our (office?) they have come on paper, and I am not sure but some came with cloth backs.

I pasted together the separate pieces of this map, with my nephew; before doing that they were in the same condition in which they came from the General Land Office. To W. line of range 37 it was continuous when they came into my hands.

The parts were put together only for the convenience of our office. When I left the office the map was turned over to my successor.

West of range 37 is another map running from range 30 to 37. I pasted the latter to the former. I remember it distinctly.
196 The words on (second?) part of map, with two dates, I am not able to remember how they came here. The dates were on the margin, and the margin was cut off, and the dates transferred to the face of the maps, the margin being of no use.

The words referred to were put on by my nephew in my presence I think it is in his handwriting.

I don't remember any one else helping me on this map; we worked on it together.

The words "July 31, 1868, 2 F." I do not know who wrote them, it is not my hand nor my nephew's. West of the second R. 37, another map is pasted over; the range is given from this map; it is R. 38.

Q. Did you have any official diagram in your office showing limits of the Winona and St. P. R. R. in R. 38 & 39?

A. We did showing railroad limits through range 38. As to the section lines I will not say.

On upper left-hand corner the map pasted over the other,
197 I believe, I did it while I was an officer in New Ulm office; I pasted the same map on that which is here now; the

one which I pasted over and which is now on top, I found in the land office when I took possession; it was one of the records of my office. The one I referred to as running through R. 38, was a record of the office; I do not know where it has gone; it ought to be here.

Q. The map in upper left-hand corner—I observe certain limits marked in R. 38.

A. This was just as I received it, except as to R. 38, which was a blank margin of townships when I received it. My recollection is that I put the land limits on this R. 38 myself as a guide for me in my office.

On cross-examination, witness said:

I went into office in March, 1861, about latter part of March; I left in May, 1865, or first of June, 1865; I took the office again
198 in 1869, I think in June, and remained four years. Henry A. Swift was not an officer there while I was; my nephew was Nelson (Tilson?) Tibbetts; he was clerk in the office; I think he came in in latter part of summer or in fall of 1869, and from that time was in the office occasionally for 3 or 4 years, but was not there before 1869. He did not take away any of the maps or records of the office to my knowledge. I received this map first when I took possession of the office in 1869; I had no portion of the map in my possession prior to 1869; I rec'd this map from R. 12 to 37, inclusive, from Mr. Donner, the receiver; it was not then in this shape pasted on any board or background.

I received the next piece, from R. 30 to 37, at same time, but it was detached.

The words "act of extension of Minn. Val. R. R." were on when I received it. I have no doubt about that. The ranges 38, 39, & 40, referred to in such statement, may extend under the other map when I pasted the other map over; I think this was a map
199 from 31 to 40; that is my recollection.

We put all these pieces together on the background at the same time, including the one covering ranges 38 to 40. ("The one bearing words rec'd Oct. 20, 1869.") Am not positive I put these words on upper left-hand corner, but I think we did. It may have been put on a short time afterwards. I have no knowledge when these pieces were rec'd in the land office. The transcription of words from margin to face of the map was done at the same time. I am not able to reconcile how these two dates came on the same paper. I suppose the date "rec'd Oct. 20, 1869," was on the margin; I am confident it was. The date "Oct. 7, 1868," was also on the margin, and transferred. The map describing R. 38 I am not able to describe. I am positive it was there. I cannot say if it had only the range on it. I cannot say whether I received it from Wash-
ington. We lost a number of maps, and got others from
200 Washington. I cannot say how many townships it had on it; I cannot give any reason why I did not paste it on here.

I remember copying this R. 38 from that. I do not remember that that had any date of reception on it, and cannot say this "Oct. 7, 1868," was date of reception of R. 38. We have no reception book

for entry of dates of receiving maps, and have no other record than the date entered on the map itself, unless on the letter accompanying it. I am not able to say whether I took one of these double dates from one map and the other from another. I think I never saw that map of R. 38 till 1869. When I last saw it must have been in the land office, but I cannot state where in the office. We usually kept them posted up on the wall. I don't remember that I ever saw that map of R. 38 posted up. The limits laid down here on R. 38 were taken from the map referred to. I am not able to say why I did not make the land limits on 38 correspond
201 with those beyond. It may have been a temporary matter.

Redirect:

Q. Had the map R. 38, referred to, all the limits of the W. & St. P. R. R.?

A. I think the lines were all marked. Words "rec'd Oct. 20, 1869," on this map I think were put on by my nephew. I was in the land office at that date. It might have been on margin and transferred, or might have been put on when map was received.

Nelson (Tilson?) Tibbetts is now at Redwood Falls in this State. There was a map pasted on the left-hand side so it could be lifted up and see what was below it. Except the land limits on 38 the limits were all on when I rec'd it. I think it was in 1871 I pasted these pieces together; may have been earlier.

Said witness, being called in chief by def'ts, testified as follows:

202 I was register in land office in 1864. I remember a map in the office representing the line and limits of the Minn. Valley railroad. The date of its reception, I do not remember whether it was in 1863 or 1864.

(Witness shown Ex's 113 & 120.) I should think the map was rec'd about the time referred to in the exhibits. I do not recollect receiving any other map at about that time. I can't say if it had the mark "B" upon it.

I think it was there when I left the office. My impressions are quite clear as to the map. It was an old territorial map of the whole State, and on it in colors were traced out the 6, 10, and 15-mile limits of the Minn. Valley railroad, and as to the 20-mile limits I am not sure. I am not clear as to when it was received. It was posted up when I saw it every day for a long time. It was a colored map, the limits were in colors, and the map extended, my impression is, to the limits of that road in the State of Minn.; of that
203 I will not be sure, I mean to the State line; I have that impression now. I am not positive whether it showed the line of any other road.

I have no recollection of it. I received a letter with the map from the Department. (Witness shown Ex. 113.) I am not able to say whether this is the letter accompanying that map. I can't say that any other different letter accompanied it.

(Witness shown Ex. 120 to refresh his recollection.) My memory is not sufficient to define the line on the limits on the map. I have

nothing definite I can testify to. I know it showed limits. They all do. I can't say any definite limits were fixed on that map.

Q. What way does Ex. 120 refer in reference to limits?

A. My memory is not sufficient to define the map whether it is the same one I speak of. I think I left office May, 1865. The map was received and kept as a record of the office.

204 Q. Did you, during the summer of 1864, raise the price of the even sections within any of the limits on that map to $2.50 per acre?

A. The withdrawal of lands excludes all sales until restored to market. My impression — the price was raised to $2.50 per acre that summer.

On cross ex. witness said:

When we received maps defining limits, instructions always follow that lands in 10-mile limits be raised to $2.50. It is not optional with local officers to do that. I do not remember that I received such instructions with that map. The limits on it were marked by townships. It was not colored by sections, but by townships. I am not able to say whether it was a sectional map. I think the limits were marked by townships only. I should say the price was not raised on that diagram, but in some other instructions.

I cannot swear positive that before I left the office in 1865
205 the price of lands west of R. 31 on behalf of the Minn. V. R. R. was raised.

The map commenced at St. Paul, and I believe went through the State to the Iowa State line; it touched on what towns and ranges it run through. The colored strip took a general course southwest, as is my impression, diagonally across townships. (Ex. 113 shown witness.) I think it was a body of lands colored in the neighborhood of twenty miles wide, but my memory is not clear as to the width. The line of the road was marked; that is so on all the maps. I am quite positive the line was down. My impression is pretty clear that the line of the road was drawn and a strip of land on either side, and that that strip had a continuously straight line, and was colored.

The exterior of the colored strip was parallel with the line of road indicated as the centre line—that is my impression. I
206 think there were no precise limits fixed on that map.

Q. Prior to the receipt of this map had there been any line or limits marked west of R. 31; was there anything in the office showing *showing* that?

A. My memory is not clear as to that; I cannot answer that; we permitted pre-emptions up to the time these maps were received.

Redirect:

The line of limits commenced at St. Paul; I am sure of that; I remember the road was already located to R. 31, and I was selling the lands; the exterior lines did not begin at 31; my impression is it was 20-mile limits represented on both sides; I am not sure the 15-mile limits were fixed.

JOHN B. BLOSS, a witness called on behalf of defendant, was duly sworn, and testified as follows:

Direct examination by Mr. PALMER:

I reside in Washington city; have resided there since April, 1857: I am practicing attorney before the Land Department specially; this is my occupation; I occupied a position in the Land Department of the United States.

207 I was a clerk in the General Land Office a portion of the time; I was there *I was there.* I was head of a division—accounting divisions. I commenced in General Land Office in May, 1857; I was transferred in March, 1867 to the Secretary's office proper, where I remained continuously from '57 to '67; I was transferred to Secretary's office and took place of Gen'l Simson, who was an officer of the army, and had been detailed by Secretary Harlan to duty on the Union Pacific. I took special charge of all matters in the Secretary's office from 1867 to Sept. '70 or '71; I don't remember which; I am not certain which; I was familiar with the practice of the office in dealing with what is called railroad lands.

Redirect examination resumed:

Mr. BLOSS: I would like to state further, if it would be proper, that from '54 to '61 I was book-keeper: had charge [of] the accounts; that from '61 to '67 I had charge of the division which had all the records of the land office in Minnesota.

Q. What is the first thing done with reference to making any selection of railroad lands by land grant roads?

208 Ans. Well, in the first place, the railroad map of location comes in; that is secured; the limits are laid down on that map as a general rule; then a diagram is made showing the lines of the road and the granted and indemnity limits; that diagram is sent to the local land office with instructions to withdraw the lands that are included within the grant; then a list is made in the land office—that is, the tract that is gone through with and the tracts taken off that appear to be vacant and inure to the grant; that list is sent to the local land office to be revised by the local land office and to report whether or not there is any conflict. On the return of that list to the Gen'l L'd Office, a clear list is returned of the lands found vacant that appear vacant and unappropriated.

That list is sent up to the Secretary for approval as land inuring to the grant.

On its approval by the Secretary, it is returned to the Commissioner, and that list is filed with him and a certified copy is sent to the Governor of the State, if it is a grant to the State, and

209 also a copy is sent to the local office for their information.

Q. Is the copy sent to the local land office a certified copy?

Ans. No, sir; that is the way the lands are designated. That was the practice up to the passage of the act of July 1, 1864, and the instructions issued under it on May 30, 1866.

Ques. Now, during that period, Mr. Bloss, did the companies—any of the railroad companies—have anything to do with these lands

in the way of selection, certification—anything more than filing their maps?

A. An agent of the State was generally there to see that the work was done, but so far as making out the lists, he had nothing to do with it. It was all done by the department itself.

Redirect examination:

Q. Was there, then, one general rule on that subject in practice in the Department?

A. I think there was.

Q. What was that rule?

A. The general rule was that after a map had been filed, and especially if any action had been taken on it, they could not allow a change of the line.

210 Cross-ex by Mr. WILSON:

Q. When a map of location of a railroad is filed in the General Land Office, if accepted there is some act taken under it, is there not?

A. Generally.

Q. That is the rule, is it not?

A. Yes, sir; they generally withdraw the lands immediately.

Q. When a map is filed in the office they either file it with or without acceptance?

A. It either remains on file or is returned to the parties.

Q. When it is accepted, you stated on your direct examination certain things were done by the Department; there they enter it on the map in the office, do they not.

A. What, a formal approval?

Q. No; not a formal approval in words, by entering (on?) the map or plats in the office of the line or limits.

A. That is preliminary to withdrawal.

Q. What is done first, the first thing when a map is filed in the office as accepted?

A. The map is received and the general rule was to lay the limits down on diagrams in the office and send those limits to the local officers.

Q. Those diagrams represent the line of route and the 6 and 15-mile limits?

211 A. Yes, sir.

Q. These are sent to the local offices with instructions to withdraw the lands?

A. Yes, sir.

Q. And a letter of instructions?

A. Certainly.

Q. That letter is made a record of your office?

A. Yes, sir.

Q. Remains there on record?

A. Yes, sir.

Q. Then the lands are said to be withdrawn?

A. Yes, sir.

Q. Now, that was the rule in the office, was it not?

A. Yes, sir.

Q. What you mean by sending out diagrams from the Gen'l Land Office to the local land office, means a diagram indicating a line of railroad and the land limits of the road?

A. Yes, sir.

Q. As having been adjusted by the Department?

A. Yes, sir; the Department adjusts.

Q. The diagrams are divided into townships in small scales, showing sections; the mode of laying down is shown on that map?

212 A. The line of road is laid down just as it is on the map as received; then, with a pair of dividers, a line is run six miles from the line of road; 15-mile limits in the same way. Such a line would cut many of the sections and parts of sections through them. It has to be adjusted according to such division lines. Then they take a pencil and run it through, and if the greater part of the subdivision comes within the limits, they throw it all in; but if the greater part is outside, they throw the whole subdivision out.

Q. By subdivisions you mean what?

A. Either a quarter section or a 40-acre tract.

Q. You stated, Mr. Bloss, that the general rule was after a map was filed there could not be a change of location?

A. The Department would not recognize one.

Q. Permit me to inquire if this is not the proper statement of that proposition?

A. You mean as——

Q. Is not this the statement, that after a railroad is located on the face of the earth and its map filed at the Gen'l Land Office, and accepted by that office as the basis of adjustment of the grant,

213 then that after that time the office would not allow any change in such location nor departure from its adjustment?

A. That is the general rule; I do not see that it varies it; they file the maps in making the adjustment.

Q. Is that a correct statement of the rule?

A. Yes, sir.

Q. But that rule does not apply prior to the acceptance of the map as the basis of the adjustment of the grant?

A. Why, the Department had nothing to do with it.

Q. I will ask you if that rule prevailed prior to the acceptance of the map as the basis of the adjustment of the grant?

A. Generally, yes, as a general answer to that question.

Q. I will ask you to state specially before a map is accepted as the basis of adjustment of a grant, and before any steps have been taken upon that map by way of adjusting the grant or ordering the withdrawal of the lands under it, there was the rule of the Department that it could not be changed?

214 A. Why, I should say there was no rule until they had taken some action on the map.

Q. Until they taken some action on the map there was no rule?

A. Certainly not.

HORACE THOMPSON, sworn for the defendant, testified as follows:

Have lived in St. Paul for 15 years; was once connected with the Minn. Val. R. R. Co.; was one of the corporators under the act of 1864, and was elected president of the Co. on its first organization, and continued such a portion of the year 1864; E. F. Drake succeeded me as president; at the time of my election I had no experience whatever in railroading, and had no knowledge of what had been done by the preceding corporation in referrence to its line of road beyond Mankato.

I had no knowledge of what the previous company had done as to its line beyond Mankato, except that I was informed it was located to some point beyond there. I had never been as far as Mankato on or prior to June 21, 1864; I had not been on the line beyond
Mendota; my knowledge was that some grading had been
215 done on the road between Mankato and Belle Plaine, and line
located some distance beyond Mankato.

That was my knowledge substantially; I remember about the time our road received additional grant of 4 sections; it was in the spring of 1864.

I know C. A. Q. Morris; I arranged with him in spring of 1864 to prepare a map showing line of road from St. Paul to Iowa State line; I asked him to go to Milwaukee and procure, if possible, maps showing the location of the road as made by J. Whittemore, (I understood Mr. Whittemore had made the location for the old company,) to take the location as it would appear from their maps and papers, and from the terminous of that location, and extend a projected line to the Iowa State line in the direction of Sioux City; I recollect no other instructions; on his return he brought map from Milwaukee, and made a new one showing the whole line between St. Paul and Iowa State line; I sent it to the Governor (Miller), with a request in writing; previous to sending that map to Gov. Miller I saw it, but
gave it no particular examination; I think it was not a small
216 map, but my recollection is vague as to it; I recollect the map
as showing the line from St. Paul to south line of State, but remember no intermediate points; I do not recollect anything about any certificate on the map; I no not recollect having in my possession the maps Mr. Morris brought from Milwaukee. There was no meeting of the board in referrence to the map made by Morris and sent to Gov. Miller.

(Ex. 36 shown witness.)

I recollect writing a letter to the Governor about this time, of which this Ex. 36 is the general tenor.

That letter refers to the map I have testified was sent to Gov. Miller.

(Witness' attention called to that part of letter as follows:) "The road has been located some 20 miles, more or less, beyond Mankato."

I had no knowledge in regard to how far the road had been located, as president of the company.

Q. Upon what information, if any, did you write that letter?
A. I stated the point of location in the letter entirely from hearsay or some one's report to me.

217 I had never seen the certified maps referred to in this letter as filed in Washington, or any map here on file in the Capitol building; I think I am quite certain.

(Witness' attention called to this portion of letter:) "The Co. are about to make permanent location, &c."

Q. Had the Co. done anything about making a location?
A. They had taken no action.
Q. State why in that letter you named Mankato as a point.
A. I named Mankato as a point, having the impression at the time that the location of the road for working purposes was clearly defined to that point, on account of it following the valley of the Minnesota, and that after reaching the prairie the location would be supervised or re-examined for working purposes, definitely fixed, and with general reference, of course, to the new portions of the line, where no location had been made by Mr. Whittemore.

218 I did not know precisely where that location terminated. I had rec'd advices as to lands being taken up by pre-emptors, and warrants which the Co. would be entitled to.

I first went out into that country west of Mankato along the line of the road some years after 1864.

The map I sent Gov. Miller I saw at the time. I sent it; never saw it afterwards to my knowledge. I do not know where it is now.

On cross-ex. witness said:

Prior to my election to the presidency in 1864 I had some general knowledge of the property which the company was to recover from the State. In the spring of 1864 I and Col. Merriam were in Washington to see about the grant of land.

Col. M. has been an active member of the Co. and a vice-president.

M. got our entra grant in May, 1864.

219 I think, after I was elected president, I gave the interests of the Co. some attention at that time—spring and summer of 1864. I was active and prominent in it. I & Col. Merriam & D. W. Ingersoll were the acting men. I think, perhaps, I did a little more than either of the others. I paid some attention to legislation which transferred the lands and franchises to the Co. Capt. Blakely and Ingersoll & Capt. Berkey were very active; I was as active as any of them, perhaps, in procuring that legislation. We had no general manager in spring & summer of 1864. I had given it no special attention prior to my being elected president. I was in Washington about 3 weeks; had no conference with Commissioner of Gen'l Land Office while there.

I don't recollect of telegraphing A. Tibbetts, register at St. Peter, to withhold lands along the line of our road from Mankato.

That Com'r of Gen'l Land Office was preparing instructions to that effect, and would send them as soon as could be. I

220 don't recollect telegraphing him at all. I will say that I do not recollect conferring with the Com'r of Gen'l Land Office at all. I wish to so qualify my statement, as it is a negative matter.

I think I came away before the act had become a law. Think it had passed one house. Think I left a few days before the act passed. Think I was not there longer than three weeks. After I came home—not very long after—I sent Mr. Morris to Milwaukee; told him to get maps & whatever there was to clearly define the line from St. Paul to the State line, I think. I don't know that I gave him any instructions as to the point on the State line he was to strike, but to follow the Whittemore location as far as it had been made, and then to extend the line to Iowa State line, in the direction of Sioux City. This was the instruction in regard to preparing the map. I do not think of any other instructions.

221 I told him before he went to Milwaukee what we wanted; probably the instructions were repeated after his return. I saw him after his return; may have seen him soon after, for I was in a hurry to get the map made. He gave the map to me when made.

I did not know how far the Whittemore line extended; never knew. The instructions were to take the line where it ended & project a line down to the Iowa line. I recollect nothing about certificates on the map made by Morris. I do not recollect signing any. I recollect nothing about the points on the map, only of the general appearance of the line. It is not my recollection that it turned down to Iowa State line, where St. James now is, but further west, and it struck me the bend was rather abrupt; it struck me as being not sufficiently direct to Sioux City. The reason assigned me

222 for it was that it was so located to get around the Des Moines river.

This was satisfactory. I filed it. I have no recollection of correspondence with Whittemore. I cannot say that I did not write him. I had directly or indirectly instituted inquiries of Wells and Whittemore to get documents and papers relating to the road. We supposed they had maps or drawings that would be of some use. I have no recollection of learning this from them.

I do recollect Selah Chamberlain told me he thought they had papers he thought they would let me have; can't tell if I asked Morris when he came home what papers they had or what they had done.

I do not know whether I did learn from Morris as to this or notice as to what papers they had, and what they had done.

Ex. 36 was written after Morris came home. I looking

223 on the map made by Morris I observed the abrupt turn of the line, and asked him, and the only explanation I remember was on account of getting over the Upper Des Moines river. Morris made this explanation to me.

This was necessary on account of the topography about the Des Moines river, and that it was a proper extension of the Whettemore location, but where the Whettemore line ended I do not know.

I told Morris to commence at the end of the Whettemore line and extend it to *Souix* City as near as could be.

I don't think Morris went out into that country. I don't know that he had ever been over that line. I told him to draw a projected line that would approximate the probable line of the road, as near as he could. So far as I know he did that. It is impossible for me to say whether my interest led me to examine the map brought by Morris from Whettemore.

I had the impression the road was located as far as Mankato, (because?) it seemed necessary to follow the valley that far.

224 I suppose that beyond Mankato later surveys might show some variation. I did not *know* anything about it. I don't think that I testified "The road has been located some 20 miles," &c., because I knew it would follow the valley that far, but think it was because some one told me it had been located that far, and map filed in Washington.

I don't know who told me, nor if I was told it was located to west line of 31. I supposed certified map had been filed in Washington from some information. I can't say that any one told me that there was no location beyond a point about 20 miles beyond Mankato, or whether I inferred it from some one telling me that the location terminated out there.

We made no surveys in summer or fall of 1864. Can't tell when we did make surveys west of that. I suppose that after getting beyond Mankato to the new line that was laid by Mr. Morris it would be necessary to supervise it for working purposes.

I did not know anything about whether the line located by Mr. Whettemore would have to be revised for working purposes or not.

On redirect ex. witness said:

225 The Co. had no engineer at the time I employed Mr. Morris, nor at the time of writing this letter. They had no office at the time.

Recross:

First time Co. had an engineer, as my recollection is, was in fall of 1864. I think we had two meetings of corporators, one in spring and one in summer, when we turned over to a new directors.

CHAS. A. P. MORRIS, being called for def'ts, testified as follows:

I reside in St. Paul and have been a civil engineer for nearly 30 years. Know Horace Thompson; recollect his employing me to make a map in 1864. I did make such a map; I obtained the data for this map from the former engineer of the road—Don J. Whittemore, in Milwaukee; I got map from him. (Map marked D. W., Jr., July 15, 1875, shown witness.) This is the one he gave me, as it now is with this line upon it. (Map shown witness purporting to show line St. Paul to range 32.) Ex. 134. This is one which he gave me also. I got no other map from him showing the line of the road.

Q. In making the map for Mr. Thompson, what line did you lay down?

Q. I laid down the R. R. line as shown on these two maps
226 (Ex. 134 and D. W., Jr.); that line run from St. Paul to west line of R. 39, on a line identical with line laid on these two maps, and then in the direction of *Sioux* City to a point on southern boundary of State. I made no survey in connection with the making of the map. I had no other data for laying down that line than what I have stated. I should say I came to the capitol and compared it with a map in the Governor's office, and found it identical. I made this map in 1864; I think, between spring and summer—it was June. I finished the work, I think, in May (and forepart of?) June. I made no change east of range 39 from the line as shown on these two maps; at that point I changed that portion and run down in the direction of *Sioux* City. I never made any other map for Mr. Thompson showing any other line of the road. The line on Ex. 134 to west line of range 31 forms a continuous line with that on "D. W., Jr.," map.

The map, when made, I delivered to Mr. Thompson, the president. When Mr. Thompson employed me he told me he wished to get up a set of maps showing the line on which to show the 6, 15, and 20-mile limits, as far as Government surveys were completed, to the southern boundary of the State. Nothing was said about my
227 making any surveys, nor about the location of the road as it then was or how I was to find any line. I have not seen the map since I delivered it to him.

Q. How was map Ex. 134 when you received it from Mr. Whittemore, as to its present condition; what did you do to it, if anything?

A. It had the railroad line as now on it, and the streams and general topography, with the townships through which the line runs, and on the railroad line the dates of location were shown by flags and dates of location; the same is true of the map marked "D. W., Jr."

(Ex. 134 was then put in evidence as part of examination of witness.)

The words "B. C. A. F. Morris" I put upon this Ex. 134 at that time; I extended the exterior townships out to the edge and enlarged it.

(Ex. 107 shown witness.)

The map referred to as examined by me was in the Governor's office here, in the capitol; I presume Ex. 107 is the one. (Witness compares Ex. 107 with the one marked "D. W., Jr.") I have made comparison between these Ex. 107 and "D. W., Jr." The line of road and dates of location are identical on both maps.

On cross-ex. witness said:

228 Map 107, I have no doubt, is the one I saw; the general appearance is the same. I do not recollect seeing appended Governor's certificate or clerk of court (pasted on) on it then; I do not recollect if certificate of W. W. Curtis was on it.

(Ex. 135 shown witness.) It appears to be a copy of the other. The names of Don. J. Whittemore, appended to certificate on 135,

appears to be original. It appears to be a copy of the original record, Ex. 107. In 1864 I did not see the certificate of clerck of court on the map that I recollect. I cannot swear positively that 135 was not the map I then saw. Ex. 107 looks more like the one I saw. I don't remember the certificates of Mr. Curtis on that of the Governor, or "now Minn. R. R. Co. 1864." I did not read all the certificates. I remember seeing the certificates of the president and engineer.

If I had seen 135 in the Gov. office I would not have questioned, but it was an original, but I think it is a copy. And Ex. 107 looks like the one I then saw. In 1864 I did not examine particularly to know whether it was an original. I remember very nearly what Mr. Thompson said he wanted me to do.

I remember the purport, p-rehaps, not the phraseology. I
229 spoke to him about it a few days ago, but at no other time.

Nothing particularly impressed this conversation on my mind other than the employment. He told me to go to Milwaukee, and to whom to go, and that I would find the documents there.

Mr. Thompson did not state to me that they proposed the following fall to locate the line of their road to the southern line of the State.

On redirect ex. witness said: I did not make map, Ex. 135.

Q. Could the certificates and signatures and the whole map, Ex. 135, have been produced by tracing from Ex. 107?

A. It certainly could; it is a perfect copy. I did not make map, Ex. 107, but, as I think, found it in the Governor's office.

On re-cross ex. witness said:

Ex. 107 could be made by placing it over 135, as well as 135 by placing it over 107.

I think the irregular lines, apparently indicating land limits, were not on Ex. 107 when I saw it in Governor's office.

I saw then in the Governor's office only one map indicating this part *part* of the line of the road.

230 HENRY H. SIBLEY, sworn for def'ts, testified as follows:

I recognize Book Railroad No. 1.

It is a record of the executive department of Minn.; Mr. Wheeler was my private secretary at that time. (Date of entry shown.)

That entry of March 5, 1859, is in the handwriting of Mr. Wheeler, my secretary at that time. It was made in the discharge of his official duty. (Witness shown certificates on Ex. 103 and 107, and two entries in Railroad Book No. 1.)

My recollection of maps is very indistri-ct. I have a general recollection of the delivery of all these maps, but at what particular time I cannot tell without referring to the record. I have no recollection of receiving maps from Mr. Whittemore at any other time or in any other manner. My recollection is that one of the duplicates filed by him was sent to Washington, and the other kept in the department here. At that time the maps filed were kept in the

executive office. Mr. Baasen was secretary of State at that time. I have an indistri-ct recollection of J. J. McCollough; don't
231 remember whether he was assistant secretary of State. I know signature of Dan'l Wells, Jr. (10 shown witness.) I think that is his signature.

On cross-examination witness said:

Have seen Wells write his name and believe this to be his signature. I can't say my impression of receiving a map from Whittemore amounts to a recollection.

I have an impression. My recollection is not very vivid of sending a duplicate to Washington. My recollection is more from my habit of doing business than from distri-ct memory.

I have about the same recollection as to this as of sending the map of the Winona and St. Peter Railroad Company.

My recollection as to this is, that I sent one of the duplicates of such road to Washington as soon as received.

I have been a director and stockholder in def't's road since its organization in 1864. My term of office, as Governor of Minn., ceased on Jan'y 1, 1860.

The map referred to and which was sent to the General Land Office, with the foregoing letter of President Thompson, was an exact copy of the map which was received at the General Land Office April 13, 1859, as set forth in the first decision filed
232 in this cause, and was drawn by an engineer from an office duplicate map which had remained in the possession of Don. J. Whittemore, the chief engineer of the Southern Minnesota Railroad Company, at the time said map, filed April 13, 1859, was made, and there was no evidence given upon the trial of the cause, unless the evidence specifically set forth or summarized in the bill of exceptions herein shall be found to have that effect, showing that at the time Thompson wrote the letter of June 21, 1864, he knew, or did not know, that the map referred to therein was such copy as aforesaid, or that such map of April 13, 1859, had or had not been sent to the office of the General Land Office, or when such facts came to his knowledge.

The exhibits referred to in the foregoing evidence of Thompson, Morris, Blakely, Sibley, Brown, and Tibbetts were introduced on said trial, and the said Exhibits numbered 57, 81, 103, 107, 134, 135, and "D. W., Jr." are hereby made a part of this bill of exceptions, and referred to as originals to be produced; and said Exhibit
88, which was introduced in evidence by said plaintiff, being
233 now retained as a record in the local land office at New Ulm, is also hereby referred to and made part of this bill of exceptions for consideration in any hearing based upon such bill of exceptions.

Said Ex. 120, referred to in the aforesaid evidence of Tibbetts, was introduced on said trial by def'ts, and is in the words and figures following, to wit:

The plaintiff introduced in evidence a resolution from the records of the defendant company, under date of March 4, 1865, as follows:

"The committee appointed Captain Blakely to proceed to Washington as agent of the State and the company to adjust our land grant with [the] Government, also request that he have Senator Rice assist him if possible."

Plaintiff also introduced in evidence the following exhibits, to wit: Ex.'s 12, 13, 25, 28, and 87.

Ex. 12.—D. A. D.

GENERAL LAND OFFICE, *April* 9, 1857.

Register & Receiver at Chatfield, Minn. Ter., and
234 *Register and Receiver at Faribault, Minn. Ter.*

GENTLEMEN: By telegraphic despatch of the 7th ultimo you were required to suspend from sale and location, until further orders, all the lands in your district.

The object of the above suspension or withdrawal is to protect from ordinary sales or location, so far as they can be described by townships, all the offered lands falling within the probable line of the routes under the grant to the Territory of Minnesota by the act of Congress approved 3d March, 1857, to aid in the construction of certain railroads in that Territory, and I have to request that you will continue the aforesaid withdrawal from sale or location until otherwise directed.

But it will be observed that the act of Congress recognized pre-emption claims upon settlements made up to the time when the lines or routes of said roads and branches are definitely fixed; that is, by the decision of the late Attorney General, until the lines of roads or any parts of them are *surveyed, marked, and fixed on*
235 *the ground.*

The evidence of surveying and marking the different sections of the roads will be required to be filed in the district offices at the proper time as the surveys progress.

Therefore pre-emption claims based upon settlement made up to that date on any of the lands withdrawn, whether offered or unoffered, surveyed or unsurveyed, will be allowed by you if right in all other respects.

You are hereby enjoined, in acting upon these claims, to require the testimony to be explicit and satisfactory in showing the actual settlement, its extent and continuance, and also that it is *bona fide*, and not speculative.

The exercise of official vigilance will enable us to secure *bona fide*, present, actual settlers on the one hand, and on the other to exclude and reject merely speculative and fraudulent claims, whereby the purposes of Congress in making the grant might be frustrated.

Acknowledge the receipt of this by mail.

I am, very respectfully, your ob't serv't,

236 JAS. S. WILSON,
Acting Commissioner.

Ex. 13.—D. A. D.

General Land Office, *July* 21, 1857.

His Excellency Samuel Medary, *Governor of Minnesota.*

Sir: I have the honor to inform you that in pursuance of the act entitled "An act making a grant of lands to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State," approved March 3, 1857, U. S. Laws for 1857, p. 195, telegraphic dispatches were sent from this office on the 7th March last to the several land offices in the Territory of Minnesota withdrawing from sale and location all lands which would fall within the probable limits of selection according to the best information in our possession, and which instructions were repeated by mail on the 9th April last.

237 It will be perceived that the grants are made direct to the Territory; it will therefore be necessary in the adjustment of them that we should have the corporation of selecting agents duly appointed by the authorities of the Territory. The first thing to be done is to transmit to this and the proper local offices separate connected maps of the several roads certified as the line of route as "definitely fixed" by the respective companies, under their seals, the dates of location to be verified by the affidavits of the engineers and certified likewise by the Governor, under the seal of the Territory, as these maps will form the basis of the adjustment, they should show the connection on a convenient scale of, say one inch to the mile with the public surveys, and it will be sufficient if only one section on each side of the road be shown. On the receipt of the maps of final location, the route of each road will be laid down on the township plats, as also the six and fifteen-miles limits & the lists prepared without delay of the vacant and sold lands within six

238 miles, & such lands as are found not to fall within fifteen miles, the prescribed limits of selection can at once be restored to market, as the title of the Territory will vest in the alternate sections within six miles of the roads from the dates when the lines of route are "definitely fixed," and also that of the right of way under the general law of the 4th August, 1852, from the date of the filing the maps of the same in this office. The importance of an early compliance with these requirements as well as accuracy in showing the tracts cut by the routes will be seen appreciated.

Resp't'y, your ob't servant,

THOMAS A. HENDRICKS,
Commissioner.

Ex. 25.—D. A. D.

Department of the Interior,
General Land Office, *Aug.* 10, 1864.

Register and Receiver, St. Peter, Minn.

Gentlemen: I herewith enclose to you a diagram of the exten-

sion of the Winona & St. Peter railroad, showing the 6 & 15-mile limits thereof.

239 You will note these limits on your plats with lead pencil, & will be governed in dealing with the lands within the limits by the same rules & regulations as govern you in the disposal of lands along the other parts of this road; that is, from the date of the reception of this letter the odd sections within the limits are withdrawn from sale, pre-emption, or homestead entry. The even sections within the six-mile limits are increased in price to $2.50 per acre. The rights of pre-emption are governed by the date of actual survey on laying down of the lines of the road as designated on the map.

You will be pleased to acknowledge the date of the receipt of this letter.

Very resp't'y, &c., JAS. S. WILSON,
Acting Commissioner.

Ex. 28.—D. A. D.

General Land Office, *April 11th*, 1865.

R. Blakely, *Com'r of State of Minnesota, Present.*

Sir: I have to acknowledge the receipt of your letter of the

240 7th inst., enclosing your appointment by the Governor of Minnesota as commissioner to make selections under the 7th section of the grant to said State for railroad purposes, approved May 12, 1864.

As a reply to your inquiry, as to when the selection under the grant can be made, I enclose herewith my letter to Mr. Drake, the president of the road, dated the 8th inst.

In reply to your verbal inquiries, as to what steps are necessary to be taken to definitely locate the Southern Minnesota, now Minnesota Valley, railroad, from the west line of township 107, range 31, to the Iowa State line, I have to state that the authenticated maps required must show the survey & final location of the road, as actually staked off & fixed on the face of the earth.

Upon said maps the date of survey from point to point must be given, and the correctness of the same must be attested by the affidavit of the engineer.

The map should be certified to by the president of the company under seal, which certificate should show it to have been

241 accepted by the board of directors, & to be an official survey of the route of the railroad, as established on the face of the earth.

The Governor's certificate, under seal, is also required to be attached to said map, showing the location to have been made in pursuance of the act of Congress approved March 3d, 1857, & May 12th, 1864, & the acts of the Legislature of Minnesota, dated, accepting the grant & transferring the same to the said company.

Very resp't'y, JAS. S. WILSON,
Acting Commissioner.

Ex. 87.—4 D. D., 466.

Department of the Interior,
General Land Office, *August 10th*, 1865.

Register & Receiver, *St. Peter, Minn.*

Gentlemen: A map of the survey & location of the line of route of the Minnesota Valley (formerly Southern Minnesota) rail-
242 road from the west line of town. 107, R. 31, to the west line of town. 104, R. 39 west, has been filed in this office by E. F. Drake, Esq., president of said railroad Co., & it is accepted as the basis of the adjustment of the land grant.

I inclose herewith a diagram showing the line of route of said road through the townships and ranges mentioned with the 6 & 15-mile limits per act March 3d, 1857, also the 10 & 20-mile limits per acts May 12, 1864, & March 3d, 1865, & you will withhold from settlement, entry, and location all the odd-numbered sections within twenty miles on each side of the road. This order will take effect *from* & after its reception at your office; from and after that date the even sections within the 10-mile limits will be increased to double the ord*ering* minimum price, as per the 4th section, act March 3d, 1865, Laws, p. 526.

The proviso to the 3d section of this act, except in favor of the Minnesota Valley railroad, any lands falling within *the additional* limits of the roads therein provided for.

You will acknowledge the date of the receipt of this order.

Very resp't'y, your ob't servant,

243 J. M. EDMUNDS,
Commissioner.

I also enclose a diagram showing the line of said road & the 6, 10, 15, & 20-mile limits thereof, from the north line of township 115 southward, by which with the one first mentioned herein & the one enclosed with my letter of the 1st instant, will be followed by the withdrawal and in the disposal of lands as hereinbefore provided for.

J. M. E., *Com'r.*

And the foregoing was all the evidence introduced in the case which showed or tended to show what was the purpose of the Land Department of the Government in withdrawing said lands in July 7th, 1864, or in suspending them from settlement, location and sale, and there was no evidence whatever introduced on either side, except such as appears in the bills of exceptions in this case, or in the finding of fact first made by the court herein showing, or tending to show, that said order of withdrawal had ever been revoked or changed, or that said lands embraced therein, or any of the
244 same, were thereafter restored to marked or made liable to settlement, location, or sale.

Said conclusions of fact and law, and each and every of the same, embraced in said decision filed in said cause under date of Oct. 10 1878, were duly and specifically excepted to by said def'ts, and the

same were allowed by said court. Said decision of Oct. 10, 1878, is made part of this bill of exceptions.

The foregoing bill of exceptions, having been by me found conformable to the truth, is hereby allowed as a separate and additional bill of exceptions to the former bill heretofore settled and referred to in the decision dated Oct. 10, 1878, and the same is signed and made part of the record in said cause.

Dated Jan'y 3, 1879.

(Signed) D. A. DICKINSON,
Judge District Court, Sixth Judicial District.

245 STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth Judicial District.

THE WINONA AND SAINT PETER RAILROAD COMPANY
against
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, CHARLES SCHEFFER, WILLIAM R. MARSHALL, HORACE HALL, GEORGE P. WILSON, and CHARLES H. BIGELOW.

This action (the *venire* in which was originally Watonwan county, but was by consent of parties changed to Blue Earth county) being at issue upon the complaint (amended) and the answer thereto, came on to be heard before the court on the 30th day of July, 1875, and the trial thereof was continued from time to time until the 8th day of August, 1877, when the evidence was closed; and on the 21st day of September, 1877, after argument made by counsel for the respective parties, the cause was submitted for the determina-

246 tion of the court.

The facts of the case are found to be as follows: This plaintiff, The Winona and Saint Peter Railroad Company, and the defendant, The Saint Paul and Sioux City Railroad Company, are each corporations duly created and organized by and under the laws of the State of Minnesota, under and by virtue of an act of the Territory of Minnesota approved March 3rd, 1855, entitled "A bill to incorporate the Transit Railroad Company." The Transit Railroad Company was organized, incorporated, and created with all the powers, rights, privileges, immunities, and franchises in such act of incorporation specified and granted under and by virtue of an act of the said Territory approved March 2, 1855, entitled "A bill for an act to incorporate the Root River Valley and Southern Minnesota Railroad Company." The Root River Valley and Southern Minnesota Railroad Company was created, incorporated, and organ-

247 ized with all the powers, rights, franchises, and immunities in said act specified and granted. By an act of Congress approved March 3rd, 1857, entitled "An act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroad in said State," the United States granted to the Territory of Minnesota, for the purpose of aiding in

the construction of railroads from Stillwater by way of Saint Paul and St. Anthony to a point between the foot of Big Stone lake and the mouth of Sioux Wood river, with a branch *via* St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory might determine; from Saint Paul and from Saint Anthony *via* Minneapolis to a point or junction west of the Mississippi river to the southern boundary of the Territory in the direction of the mouth of the Big Sioux
248 river, with a branch *via* Faribault to the north line of the State of Iowa west of range 16; from Winona *via* Saint Peter to a point on the Big Sioux river south of the 45th parallel of north latitude; also from La Cres-ent *via* Target lake up the valley of the Root river to a point of junction with the last-mentioned roads east of range 17, every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads and branches. And it was in and by said act of Congress further provided and enacted that in case it should appear that the United States had, when the lines or routes of said roads and branches were definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents to be appointed by the Government of said Territory or future State of Minnesota to select, subject to the approval of the Secretary of the In-
249 terior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as should be equal to such lands as the United States had sold or otherwise appropriated or to which the right of pre-emption had attached as aforesaid, and that the lands thus granted and selected should be held by the said Territory or future State for the uses and purposes aforesaid; and it was in and by said act of Congress further provided and enacted that the lands to be located or selected as aforesaid should in no case *to* further than 15 miles from the lines of said roads and branches, and be selected for and on account of each of said roads and branches, and that the lands so granted and selected for and on account of said roads and branches severally should be exclusively applied in the construction of that road for and on account of which said lands were granted, and that said lands should be applied to no other purpose
250 whatever. By further provisions of said act the lands thereby granted were subjected to the disposal of the Legislature of said Territory or future State for the purposes therein expressed (that by aiding in the construction of such roads and branches), and no other, and were to be disposed of only in the manner in said act indicated. Reference is made to said act of Congress for the further provisions of the same relative to such grant, and to the disposal of the same by the said Territory or future State.

By an act of the Legislature of the Territory of Minnesota, approved May 22nd, 1857, entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in

alternate sections, to the State of Alabama to aid in the construction of a certain railroad in — State, and granting certain lands to railroad companies therein named" (to which act Session Laws, extra
251 session 1857, page 3, reference is made), the said Transit Railroad Company was authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate the Transit railroad from the city of Winona on the most direct and feasible route by way of St. Peter to the Big Sioux river south of the forty-fifth parallel of north latitude; and further, by such act of the Territorial Legislature, there was granted to and vested in the said Transit Railroad Company for the purpose of aiding in the construction of said railroad, all the interest and estate then present or prospective of the said Territory or future State in or to any and all lands granted by the United States by act of Congress above referred to to the said Territory for the purpose of aiding in the construction of a railroad from Winona *via* St. Peter, to the Big Sioux river. By the same act of the Territorial Legislature, approved May 22, 1857, the said Root River Valley and Southern Minnesota Railroad Company was authorized and
252 empowered to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate a railroad from St. Paul and St. Anthony *via* Minneapolis to a point of junction at Shakopee City, in the county of Scott, and thence *via* Belle Plaine, Clarksville, Le Sue-r, Traverse de Sioux, St. Peter, Kasota, Mankato, and South Bend to the southern boundary of the Territory of Minnesota, in the direction of the mouth of the Big Sioux river; and by such act there was granted to said Root River Valley and Southern Minnesota Railroad Company all the lands, interest, rights, powers, and privileges granted to and conferred upon the Territory of Minnesota in and by virtue of the said act of Congress, approved May 3rd, 1857, which was applicable to the line of road last herein set forth, subject to the provisions in said Territorial and Congressional acts set forth.

By an act of Congress, approved May 12th, 1864, entitled "An act for a grant of lands to the State of Iowa, in alternate sections,
253 to aid in the construction of a railroad from St. Paul and St. Anthony *via* Minneapolis to a convenient [point] of junction west of the Mississippi to the southern boundary of the State, in the direction of the mouth of the Big Sioux river, four additional alternate sections of land per mile, *to be selected* upon *the same conditions, restrictions, and limitations* as are contained in the act of Congress before referred to, approved March 3d, 1857, and with the provision that the land be so located, by virtue of such act of 1864, might be selected within twenty miles of the line of said road, but in no case a greater distance therefrom.

By an act of the Legislature of the State of Minnesota, approved March 2d, 1865, entitled "An act to accept the grant, and in execution of the trust made and created in and by section seven of an act of Congress, approved May 12, 1864, entitled 'An act for a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of a railroad in said State,'" to which act, ch.

254 XV, Laws 1865, reference is made, the State of Minnesota did accept such additional grant, and undertook and assumed the trust created by such grant; and, further, by such act of March 2, 1865, there was granted to and vested in the Minnesota Valley Railroad Company (of which this defendant, The St. Paul and Sioux City Railroad Company, is the successor, as is hereafter to be found) all the lands, interest, rights, powers, and privileges granted to and conferred upon the State of Minnesota in and by said act of Congress approved May 12, 1869.

By an act of Congress, approved March 3d, 1865, entitled "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," to which act reference is here made, it was enacted that the quantity of lands granted by the said act of Congress, approved March, 3d, 1857, to the State of Minnesota, should be increased to ten sections per mile for each of the railroads and branches, to aid in the
255 construction of which such original grants had been made, provided that the land to be so located and selected should in no case be further than twenty miles from the lines of said roads and branches, to aid in the construction of which such grants were made, and that the said lands granted should in all cases be indicated by the Secretary of the Interior. By the terms of such act it was further provided that nothing therein contained should interfere with any existing rights acquired under any law of Congress theretofore enacted making grants of land to the State of Minnesota to aid in the construction of railroads. By an act of Congress, approved July 13, 1866, entitled "An act relating to lands granted to the State of Minnesota to aid in constructing railroads," to which reference is also made, it was provided and enacted that whenever it should appear that the United States had sold or disposed of any lands granted to the Territory or State of Minnesota for the
256 purpose of aiding in the construction of railroads, after a definite location of the line of road, and before the withdrawal of said lands from sale at the proper local land office, the said State might, by its agent, select, in lieu of the lands so sold or disposed of, from any lands of the United States subject to sale, being odd-numbered sections within twenty miles of the line of the proper road, a quantity of land equal to that so sold or disposed of.

And by such act it was further provided that any lands theretofore granted to the Territory or State of Minnesota in aid of the construction of railroads should be, from time to time, certified to the State by the Secretary of the Interior whenever any of said roads should be definitely located. And by said act it was further provided that the lands granted by any act of Congress to said State of Minnesota to aid in the construction of railroads therein, specifically in place, or any division of ten miles of road, should not be disposed of until the road should be completed through
257 and coterminus with the same: Provided, however, That this provision should not extend to any lands authorized to be taken to make up deficiencies.

By an act of the Legislature of the Territory of Minnesota, ap-

proved May 23d, 1857, entitled "A bill to change the name of the Root Valley and Southern Minnesota Railroad Company," the corporate name of such corporation was changed to that of "The Southern Minnesota Railroad Company." Both the said Transit Railroad Company and the said Southern Minnesota Railroad Company were among the land-grant railroad companies referred to in the amendment of section 10 of article nine of the constitution of the State of Minnesota, adopted April 15, 1858, and became entitled to and accepted the loan of the State credit provided for in said section ten, article nine, so amended as aforesaid, subject to all the conditions and provisions thereof, and subject also to all the conditions and provisions of an act of the Legislature of the State
258 of Minnesota, entitled "An act concerning land-grant railroads," approved Aug. 12, 1858, to which reference is here made; and under and in pursuance of, and on the terms and conditions specified and provided in the said section of the constitution as amended, and in the said Legislative act last named the bonds of the State of Minnesota were issued and delivered to each of said two companies in the following amounts, to wit: To the Transit Railroad Company to the amount of five hundred thousand dollars, and to the Southern Minnesota Railroad Company to the amount of five hundred and seventy-five thousand dollars.

To secure the payment of the principle and interest of such State bonds so delivered to said two corporations, each of said two corporations, the Transit Railroad Company and the Southern Minnesota Railroad Company, issued and delivered to the State of Minne-
259 sota, an amount of its first mortgage bonds corresponding to the amount of State bonds by said corporations received respectively, bearing interest at the rate of seven per centum per annum, payable semi-annually, and by deeds of trust, each of said two corporations separately granted, bargained, sold, transferred and assigned to certain persons therein named as trustees, to be held by them in trust, the entire railroad of each of said respective corporations built or to be built, and all rights, property, privileges, franchises, and immunities of each of said railroad corporations respectively, of every nature and kind whatsoever which was then owned by said companies respectively, or which should thereafter be acquired or owned by them, and all right, title, interest, and claims either legal or equitable, which said companies had, or which they should afterwards acquire, in or to any lands under the act of Congress first above referred to, (approved March 3d, 1857,) or
260 under any act or acts of the Territory of Minnesota above referred to, each of said deeds of trust by said corporations respectively executed, authorizing and empowering the trustees named therein respectively, in case the said corporation executing such deed should fail to pay the principal or interest of the State bonds to such corporation given as aforesaid, or of said first mortgage bonds of such corporation as the same became payable, to enter upon and take possession of all and singular the rights, interest, property, franchises, and immunities granted in trust as aforesaid, and to sell and dispose of the same for the payment of such prin-

cipal and interest as in said trust deed provided, and to make, execute, and deliver to the purchaser or purchasers good and sufficient deeds of conveyance of the same, and out of the moneys arising from such sale to pay the said principal and interest; and in neglect or refusal of such trustees to enter upon and take possession of and sell said property, rights, and franchises, then the Governor
261 of the State of Minnesota was, in and by such trust deeds, authorized to make or cause to be made such sale and foreclosure for the same purpose aforesaid, and to do and perform all acts and things necessary and proper to be done in and about such sale and foreclosure; which said two trust deeds of said corporations were filed and recorded in the office of the secretary of State of the State of Minnesota.

Both the said Transit Railroad Company and the said Southern Minnesota Railroad Company made default in the payment of the interest due on the State bonds delivered to them respectively, and on the first mortgage bonds by them given respectively; and the trustees in said trust deeds named having neglected and refused, after such default had occurred, to foreclose such trust deeds, or to sell the said property, lands, and franchises, as they were authorized and required to do, in the year 1860, and after such default
262 in payment, and after such default and refusal on the part of said trustees, after having given due and legal notice thereof, caused to be sold at public auction and bid in and purchased in the name of the State all the property, rights, privileges, and franchises pledged in such deeds of trust, and transferred and conveyed the same to the State of Minnesota by deed duly executed; said State thereupon acquired and became possessed of all the rights, property, privileges, and franchises of every kind which the said Transit Railroad Company and the said Southern Minnesota Railroad Company had ever owned or possessed.

On the 10th day of March, 1862, the State of Minnesota, by an act of its Legislature, approved that day, entitled "An act to facilitate the construction of a railroad from Winona westerly by way of St. Peter, granted, transferred, and continued to certain persons therein named, as a board of directors of the Winona and St.
263 Peter Railroad Company, and to their associates, successors, and assigns, by the name of the Winona and St. Peter Railroad Company, all the property, interest, corporate rights, privileges, and franchises of, or which before had, belonged to, or been owned by, the said Transit Railroad Company, to be held by the said Transit Railroad Company, to be held by the said Winona and St. Peter Railroad Company, for the purpose and on the terms and conditions in said act provided.

On the 28th day of June, 1862, the majority of the several persons named in such act of the Legislature last referred to, under and in pursuance of such act, met at Winona, and organized as a board of directors of the said Winona and St. Peter Railroad Company, and accepted the grant and assumed the duties imposed thereby, and entered upon the discharge of the duties of directors of said Winona and St. Peter Railroad Company, which is this plaintiff, a cor-

poration as before found. Thereupon this plaintiff became,
264 and ever since has been, entitled to, and possessed of all the rights, benefits, privileges, property, franchises, and immunities which at any time before had been possessed by the said Transit Railroad Company under the laws of the Territory or State of Minnesota, and of the United States, or which the State of Minnesota acquired by virtue of the proceedings before referred to.

On the 4th day of March, 1864, the State of Minnesota, by chapter two of an act of its Legislature, approved on that day, entitled "An act to facilitate the construction of the Southern Minnesota Railroad, and to amend certain acts in relation thereto," granted, vested in, and transferred to certain persons therein named, their associates and successors, all the rights, immunities, benefits, privileges, franchises, lands, interests, and property of, or which had belonged to or been owned by the said Southern Minnesota Railroad Company, appertaining, relating, or applicable to the said line
265 of road from St. Paul, and from St. Anthony *via* Minneapolis, to a point of junction at Shakopee City, in the county of Scott, and thence *via* Belle Plaine, Clarksville, Le Suer, Traverse de Sioux, St. Peter, Kasota, Mankato, and South Bend, to the southern boundary of the Territory in the direction of the Big Sioux river, which persons, their associates and successors, were to be known by the name of the Minnesota Valley Railroad Company, and were to exercise all the rights, powers, and privileges appertaining to the Southern Minnesota railroad, for the purposes and on the terms and conditions in such act of March 4th, 1864, provided. By such statute it was further enacted that, if at any time the Congress of the United States should grant aid in lands, or otherwise to aid in the construction of the railroad provided for in said chapter two of such enactment, all such lands or aid so granted to the State, were pledged, granted to, and should become vested in the said Minnesota Valley Railroad Company.

266 On the 16th day of March, 1864, the persons named in such last recited act of incorporation, under and pursuant to said act, met at St. Paul, Minnesota, and organized as a board of directors of the said Minnesota Valley Railroad Company, and accepted said grant, and the powers and privileges thereby conferred, and entered upon the discharge of their duties as such directors. Thereupon the said Minnesota Valley Railroad Company became entitled to, invested with, and possessed of all the rights, immunities, benefits, privileges, franchises, lands, interests, and property aforesaid appertaining to the line of road aforesaid, which the said Southern Minnesota Railroad Company had, at any time previous, owned, possessed, or been entitled to under any of the laws of the laws of the Territory or State of Minnesota, or of the United States, or which the State of Minnesota acquired and held by virtue of any of the proceedings before found.

By an act of the Legislature of said State, approved March 5th, 1867, entitled "An act to authorize the Minnesota Valley
267 Railroad Company to construct a branch from Mankato, or some point near thereto, to the south line of Faribault county,"

and by proceedings thereby authorized the name of the Minnesota Valley Railroad Company was changed to that of "The St. Paul & Sioux City Railroad Company," this defendant. By a subsequent act of the legislature of said State, approved March 1st, 1870, entitled "An act relating to the St. Paul & Sioux City Railroad Company," to which reference is made, said change of corporate name was approved and recognized, its lawful acts confirmed, and such company continued under such new name, with all the rights and privileges theretofore or thereafter conferred by law.

In the year 1857 the said Southern Minnesota Railroad Company surveyed and definitely fixed the route of its road from St. Paul through the points designated in the second act of the Territorial Legislature, approved May 22d, 1857, to the west line town-
268 ship 107, range 31, in the direction of the Big Sioux river, and the road was subsequently constructed thereon.

Within the time and in the manner specified and required by the laws of the United States, and of the State and Territory of Minnesota, the plaintiff surveyed, located, constructed, and completed a line of railroad from Winona, on the most direct and feasible route, by way of St. Peter to the Big Sioux river, south of the forty-fifth parallel of north latitude, and in all respects confirmed to and complied with the several acts of the said Territory and State, as to the building of said railroad, and the provisions, conditions, and requirements of the several acts of Congress, granting lands to aid in the building of such road.

The survey upon the face of the earth, which was made for the purpose of locating the line of said road, was made between the east line of range 32 and the west line of range 37 during
269 the five days immediately preceding the 10th day of April, 1864. On or before April 15th, 1864, a map showing this line as surveyed to the west line of range 37 was deposited in the local land office of the United States at St. Peter (in which district the lands covered by such survey then were), and such map was, on the said 15th day of April, 1864, forwarded to the General Land Office in Washington by the register at the said land office at St. Peter. On the 28th day of April, 1864, said map was returned from the General Land Office to the said office at St. Peter; that the certificate of the Governor of the State, and the dates of the field work from point to point might be added, and with the further requirement that the map should be forwarded by the Governor of the State to the Department of the Interior. Such requirements having been complied with, such map, certified by the Governor of the State and with the required dates affixed, was forwarded to
270 the Department of the Interior by the Governor, and was received at the General Land Office on the 3d day of August, 1864, with a request that the lands within the proper limits be withdrawn from market.

On the 10th of August, 1864, the Commissioner of the General Land Office sent to the local office at St. Peter a diagram showing the six and fifteen mile limits, fixed with reference to such surveyed

line, with instructions to withdraw from sale, pre-emption and homestead entry the odd-numbered sections within such limits.

271 On the 10th day of July, 1865, Com'r of the Gen'l Land Office, by a communication of that date directed to the district land office at St. Peter, caused to be withheld from pre-emption and homestead, private entry and location, all the odd-numbered sections within the 10 & 20-mile limits of the Winona & St. Peter R. R. from Rochester to the west line of township (38) thirty-eight, which limits were indicated on diagram accompanying such order of withdrawal.

On the 1st, 2d, and 3d days of November, 1866, the line for the location of plaintiff's road was surveyed and staked in the field from the west line of range 37 to and beyond the west line of range 40. At this time the Government surveys of the land over which this line was run had not been completed further west than section one, township 108, range 39. By a former resolution of the board of directors of pl'ff, Jan'y 19th, 1867, such survey was accepted as a definite location of the road from the western boundary line

272 of township (108) N., of R. 37 W., to the western boundary line of township 108 N., of R. 38 west.

In February, 1867, a map showing such survey was transmitted by the Governor of the State to the Department of the Interior, and in August of the same year the Commissioner of the General Land Office sent to the proper local office at St. Peter a diagram of such surveyed line, showing the 10 & 20-mile limits as far west as Sec. one, township 108, R. 39, with instructions to withhold from sale, pre-emption, and homestead entry the odd-numbered sections within these limits.

On the second day of September, 1868, a supplemental map, made from the same field-notes as the one last referred to, was made, showing the time of such survey to and beyond range 40, certified by the Governor of the State and the president and chief engineer, this plaintiff, and was on that date transmitted to the Department of the Interior by the Governor as a map of the definite location of such road within the limits there shown. The Government sur-

273 veys to and beyond range 40 had then been completed.

On the 24th of April, 1869, the Commissioner of the General Land Office sent to the proper local office at St. Peter a diagram of such line west of range 38, with the six, ten, fifteen, and twenty-mile limits designated thereon, directing that the odd-numbered sections within such limits be withheld from sale, pre-emption, and homestead entry.

As this railroad was constructed it did not, in fact, conform to this surveyed line. The land as surveyed, and in accordance with such land limits, were fixed by the Department, as well as the actually constructed line, are both shown on Exhibit "A," annexed to the complaint in this action. Such exhibit also shows the six, ten, and fifteen-mile land limits designated by the Commissioner of the General Land Office, as above stated.

The limits indicated have been, ever since they were so fixed, recognized by the Department of the Interior in the adjust-

274 ment of the grant of land to aid in the construction of this line of road. This survey of 1864, from the west line of range 31, although made as a location of the line of road, was not made with such care as would warrant actual construction upon that precise line. Stakes were, however, driven, at distances of from 400 to 500 feet, and levels were generally taken. Courses were not run in, which would be necessary before construction, nor estimates made. The abrupt southerly deflection of the line, commencing at the west side of range 31, was made without direct reference to the proposed terminal point of the road, but for the purpose of reaching coal fields, then supposed to be in existence, and to be located in township 108, range 35, near to this surveyed line.

The survey of 1866 was prosecuted for the purpose of locating the line of road. Stakes were set, each 500 feet of the distance, which was sufficient for making a profile of the line and esti-
275 mates of the work. When, subsequently, the work of construction was commenced through those ranges west of range 31, new surveys were made under the directions of the company, and the line for actual construction fixed as indicated in Exhibit A, aforesaid, and as near to the original located line as was reasonably practicable, in view of engineering difficulties.

In February, 1872, the construction of this road west of range 30 was commenced, (it having been previously constructed westward from Winona to that point,) and in November, 1872, such construction had been completed beyond range 40. The whole chartered line has been completed and put in operation. All of the lands in controversy in this action (and which are described in the schedules attached to the complaint) lie within the ten-mile limits, as above indicated, excepting the northeast quarter of section 17, township 107, range 40.

All such lands east of range 39 are within the six-mile
276 limits, as above indicated, excepting the following, to wit: North ½ of northwest ¼ section 17, township 107, range 38; S. E. ¼ S. W. ¼, N. W. ¼ S. ½ of N. E. ¼ of section 7, township 107, range 38; S. ½ of S. E. ¼ and S. ½ S. W. ¼ section 3, township 107, range 35.

The lands described in Schedule "C," attached to the complaint, lie outside the six-mile limits and within the ten-mile limits, as above indicated.

The northeast quarter of section 17, township 107, range 40, lies between the ten and fifteen-mile limits, as above indicated.

All of the lands in litigation in this action lie within fifteen miles of the line of plaintiff's road as the same is constructed. Since the filing & retaining in the Gen'l Land Office of the maps of the survey of plaintiff's line as above found the line there laid down as the line of definite location of such road has been so recognized & treated by the Department of the Interior, & the land limits fixed with reference thereto as above found have been recognized & treated as the proper limits of the grants
277 to aid in the construction of such line of road & the

grant adjusted in accordance therewith. The State, too, has recognized & treated this as the proper location of the line by receiving & accepting certifications of lands made therewith, & through its Executive reconveying lands to the plaintiff so certified. On or prior to the 29th day of June, 1857, the Southern Minnesota Railroad Company had surveyed and definitely fixed the line and route for the construction of its said road from St. Paul through the points designated in third chapter of the act of the Territorial Legislature approved March 22, 1857, and in the direction of the mouth of the Big Sioux river as far as the east line of range 32, such location ranges, 29, 30, and 31, being made between the 20th and 29th day of June, 1857.

And this defendant, The St. Paul and Sioux City Railroad Company, has constructed and completed, and did, within the time and in the manner specified and required by the laws of the
278 United States and of the Territory and State of Minnesota construct and complete, upon the line so located its line of railroad to St. James, in the eastern line of range 32, and in the direction of the mouth of the Big Sioux river, and long before the commencement of this action in all respects did comply with and conform to the provisions, conditions, and requirements of the several acts of Congress granting lands to aid in the building of its said line of road.

In the months of June and July, 1857, a survey for the purpose of locating the line of the Southern Minnesota railroad, which had been commenced some distance east of range 32 by the chief engineer of that company, under the direction of its president, was extended westward of that and as far as range 39. The line as far west as range 35 was surveyed with considerable care, stakes set at distances of 200 feet, and levels taken at all such stations.

279 On the 26th day of October, 1858, the Southern Minnesota Railroad Company caused another survey to be made, commencing in the eastern line of range 32, at the terminus of the previously located line, for the purposes both of making a definite location of the line of its road, and of securing the lands granted by the act of Congress of 1857. It was at this time the purpose of the company to extend this survey and location in a general westerly direction, keeping at least fifteen miles north of the Iowa State line, so as to leave the full limit of the land grant between the located line and the south line of the State of Minnesota to run this line to "Sioux Falls City," now called "Sioux Falls," on the Big Sioux river, 12 miles west and 5 miles north of the northwest corner of the State of Iowa, to cross the Big Sioux river at this point, and run thence down the west bank thereof to its mouth.

This survey was commenced on the 26th day of October,
280 1858, and followed the line surveyed in 1857, as far as Sec. 26, township 106, range 34, beyond which point the two lines did not coincide, at the time of making this survey of 1858; the governmental township lines had been surveyed, but the survey had not been approved and accepted by the proper Department of the Federal Government. The section lines had not then been surveyed.

They were, however, surveyed in 1859, & the whole governmental survey of the territory over which this line was laid was approved the same year (1859). This survey commenced in October, was prosecuted until the 9th day of November of the same year, 1858, when its further prosecution became impracticable because of the severity of the weather. At this time the survey of the line had reached a point as far in the proposed course as the west line of range 39, in township 104.

This survey was made by competent engineers and with the usual corps of assistants. Stakes were set in the surveyed
281 line at first every one hundred feet, but further on, as timber became scarce, at distance of one thousand feet. Instrumental levels were taken and topographical notes made of the country along the line and adjacent to it. The country over which this line runs is, for the most part, a rolling prairie.

After the completion of this survey in the field and the return of the surveying party therefor, a map was made indicating such surveyed line, and from the notes of such survey, together with the notes of the United States Government survey, another map was made indicating a practicable line for construction. This latter line, which is indicated on "Exhibit A," attached to the complaint, as the "alleged surveyed line of Southern Minnesota (now St. Paul and Sioux City) railroad," was indicated with the surveyed line as far west as section 26, township 106, range 34. Beyond that point a surveyed line and the line constructed and mapped as last stated, did not coincide. This latter line, except in so far as it
282 was coincident with former, was not actually surveyed or marked by stakes or otherwise upon the face of the earth. It would have been impracticable to construct a railroad upon the precise line actually surveyed. This line indicated on the map is coincident with the surveyed line of 1857, as far as section 28, town. 106, range 34.

It is not an uncommon practice among railroad engineers in fixing upon routes for construction to make a survey, staking the lines surveyed upon the face of the earth, taking levels and topographical notes, and after the completion of the survey to lay down a line such as is found from the knowledge thus gained to be the most feasible or practicable. Such latter line being not necessarily coincident with the line actually surveyed.

But before construction an instrumental survey is made over this new line, and deviations made even from this as the need for so doing becomes apparent; center stakes are set, corners indicated, and the line prepared for actual construction.

283 Duplicate maps were made indicating this line (the one laid down after the return of the surveying party, and shown on said Exhibit A,) as the line of location of the Southern Minnesota Railroad Company as far as the northwest corner of section 30, town. 104 of range 39; thence eastwardly as indicated thereon. They were certified by the president, secretary, and chief engineer of the company. On the 5th day of March, 1859, these duplicate maps were by the chief engineer of the company deposited in office of the

Governor of the State one copy to be retained in that office, the other to be certified by the Governor and forwarded to the General Land Office at Washington, as the basis for its action in the adjustment of the land grant. On the 5th day of April, 1859, the Governor forwarded one of such duplicate maps, officially certified by him, to the General Land Office April 13th, 1859, when it was placed on the files of the office for further action, and the Governor of the State advised of such fact by the Commissioner of the Land Office.

284 It was the practice of the Department of the Interior not to take action upon railroad locations (under the several land-grant acts) made beyond the limits of the Government surveys until such surveys should be completed, and reported to the department.

At the time of this filing of the duplicate map in the General Land Office, the Government surveys had not been completed of all the lands over which this line was indicated as running between ranges 31 and 40.

It was the practice of the Department upon the filing of maps of railroad locations which were approved by the Department, to forthwith take action upon them, indicating the limits of the land-grant, and causing the lands within such limits ensuing to the company or to the State under the grant to be withdrawn from sale, pre-emption, and homestead entry. Where maps of location were not approved, the parties interested were advised of the objections in the way of such approval.

285 No such action was taken by the Department at this time upon the maps so filed, and further was done in the Department in respect to it until some time afterwards, as will be more fully found. Some time after it was so filed in the General Land Office, it cannot be determined when, this map was mislaid, and for the time lost. It was not again found or brought to notice until some time between April and October, in the year 1873. These maps were made and filed as maps of the located line of road as far as the west line of range 39, and for the purpose of securing action by the Land Department of the Government in fixing the limits of the grant and withdrawing lands falling within such limits from market.

The Southern Minnesota Railroad Company never pursued further a survey or attempted location of its line. It became financially embarrassed. The foreclosure proceedings on the part of the State followed, as has been found, by which it lost its fran-

286 chises, and no further proceedings were had until after the reorganization under the act of March 4th, 1864.

On the 17th of June, 1865, a formal resolution was passed by the board of directors of the Minnesota Valley Railroad Company adopting the line previously surveyed and certified as above found by the engineer of the S. M. R. R. as the line of its road.

Prior to the last-named date there had been no action taken at a meeting of the board of directors of the S. M. R. R. Co., or of its successor (the def't), adopting the line so surveyed & mapped as the line of location of the road. On the 28th of June, 1865, the president

of the new organization, with the consent of the Governor of the State, forwarded to the General Land Office the duplicate maps of such location, which, as has been found, had been left in the office of the Governor March 5th, 1859, a copy of it being first made and retained in the office of the executive in place of the duplicate so sent. The duplicate map so sent was returned from the Gen-
287 eral Land Office to the Governor of the State in the year 1875, at the request of the Governor, and is now in the State land office.

In forwarding this duplicate map in June, 1865, the president of the company requested that it be filed in the land office "as a location made at the dates indicated thereon, and that the lands within the proper limits of twenty miles on each side of the road (in odd sections) be withdrawn from sale. This duplicate map was received at the Department on or prior to July 14th, 1865. At this time there was no certificate upon the map by the Governor showing the location to have been made in pursuance of the acts of Congress making the grant, and of the acts of the State Legislature accepting the grant and transferring the same to this company.

The Commissioner acknowledged the receipt of the map, called attention to this fact, and stated that upon such certificate being sent it would be attached to the map and the map then submitted
288 to the head of the Department for acceptance and approval as the basis of adjustment of the grant as far as the lines of the public survey had been established.

Such certificate was forwarded by the Governor on the 24th July, 1865, and was received at the General Land Office on or before the 10th of August, 1865, and the map was then accepted by the Department "as the basis of the adjusment of the land grant," and on the same day (August 10th) diagrams were sent to the local land office indicating the six ten, fifteen, and twenty-mile limits of the grants of March 3, 1857, and May 12, 1864, and March 3, 1865, with instructions to withhold from settlement, entry, and location all odd-numbered sections within such twenty miles on either side of the road, and to increase the price of the even-numbered sections within the ten-mile limits to double minimum price.

In June, 1866, a survey was made from the termination of
289 the former line, as indicated, and such duplicate maps—at northwest corner of section 30, township 104, range 39, to the Iowa State line, under the direction of the chief engineer of the Minnesota Valley Railroad Company, and by its authority the survey was made between the 2d and 15th days of June. The line of this survey touched the State line at section 31, town. 101, range 42.

In the summer of 1870 the defendant caused a line to be surveyed and staked out west of St. James (which is in Sec. 13, township 106, range 32,) for the purpose of actual construction, conforming as near as was deemed practicable to the line indicated on the map filed March 5, 1859. For fifteen miles west of St. James, to Mountain Lake, the line so staked out in 1870 is identical with that on which the road was afterwards constructed. From Mountain Lake the surveyed line of 1870 followed very near that indicated on the

map filed in 1859, around a bend of the Des Moines river, to Sec. 1, town. 105, range 37, where the survey and work upon the
290 line in 1870 was suspended for that year. It was the purpose to construct the road upon the line staked out in 1870.

On the 5th day of March, 1869, was approved an act of the Legislature of the State, entitled "An act authorizing a consolidation of certain railroads," being chapter 50 of the special laws of 1869, to which, as published, reference is here made.

On the 3d day of March, 1871, pursuant to the authority assumed to have been conferred by such last-mentioned act, this defendant and the Sioux City and St. Paul Railroad Company (a corporation organized under the State of Iowa) made and entered into a contract in writing, which is as follows, viz:

"Whereas by the laws of the States of Iowa and Minnesota the Sioux City and St. Paul Railroad Company is authorized to extend its road and exercise its corporate functions in the State of Minnesota; and whereas the St. Paul and Sioux City Railroad Com-
291 pany is by law authorized to transfer to said first-named company its right to build its road from St. James to the Iowa State line, with the franchises pertaining to such portion of road, and a portion of its land grant; therefore, to carry into effect the privileges granted by law to said companies, they do hereby make the following

"*Agreement.*

"First. That the St. Paul and Sioux City Railroad Company, party of the first part, in consideration of the payments, agreements, and undertakings of the Sioux City and St. Paul Railroad Company, party of the second part, hereby grants, sells, tranfers, and assigns to the party of the second part all its rights, title, and franchises pertaining to so much of its line of road as remains to be constructed from the end of its present constructed road at St. James, in Watonwan county, to the Iowa State line, a distance of seventy-four miles, more or less, hereby granting to the said
292 party of the second part the right to construct, use, and enjoy forever all privileges and franchises pertaining thereto as fully as the same could be enjoyed by the party of the first part.

"Second. The said party of the first part further assigns and transfers to the party of the second part all its rights and interests in and to all the lands granted by Congress to aid in constructing its road lying within the original six-mile limits of the grant from a point twenty miles west from the west side of range number thirty-one, being all the lands in place, westerly from that point, to be taken according to the mode of adjusting adopted by the State, commencing at the west end of the block of advance sections retained by the St. Paul and Sioux City Railroad Company lying immediately west of range number thirty-one, which lands have been, or are to be, conveyed to the St. Paul and Sioux City
293 railroad for road now constructed, the quantity of lands, the rights to which are hereby transferred, being two hundred and thirty thousand acres, more or less, hereby authorizing said

second party to enter on and construct said line of road, and demand and receive from the State of Minnesota a deed or deeds for said lands hereby transferred, to have, hold, enjoy, and sell lands in the same manner and to the same extent as they could have been held, sold, and enjoyed by the said party of the first part.

"Third. The party of the first part hereby agrees and binds itself to unite its track at St. James with the road to be constructed by the party of the second part, and deliver to and receive from said second party passengers and freights from and to all points on their respective roads, and for all business intended for points on the route of either road or points beyond, or points to which either is a reasonable competing line with any other road or roads; to
294 unite in a perpetual alliance for business against all rival routes, hereby agreeing to do all things reasonable and necessary to make of the lines of road of the parties hereto a through line from St. Paul to Sioux City. And the party of the first part hereby binds itself not to unite with, consolidate, or enter into business relations with any other road that may be constructed, or form a line to any point on the road of the party of the second part to the prejudice of said second party.

"Fourth. The party of the second part, in consideration of the transfer and agreement hereinbefore specified, hereby agrees to take and accept the franchises, rights, and lands hereinbefore transferred, and proceed without delay to construct and equip for business said road from St James to or near Graham lake, so that the same shall be completed for business during the year 1871, a distance of about forty-five miles, and complete the whole of said road to the
295 Iowa State line, during the year 1872, as a first-class railroad, and to grade all the portion of the Sioux City and St. Paul road from the junction wtth the Iowa Falls and Sioux City road to the Minnesota State line, and to fully complete and equip the entire line from State line of Minnesota to a junction with the said Iowa Falls and Sioux City railroad by the end of the year one thousand eight hundred and seventy-two.

"Fifth. The second party further agrees and binds itself to perform and reciprocate to the party of the first part, for its benefit, all the things undertaken and agreed in the third item hereof for the benefit of the second party by said first party, and to connect its track with the track of the first party at St. James; to deliver to and receive freight and passengers from said first party for all points on their respective roads or points beyond their limits, or for
296 roads connecting with either of said roads, and afford all facilities and do all reasonable things required to make the roads of said parties a through line from Sioux City to St. Paul, hereby forming an alliance offensive and defensive with said first party in operating their respective lines against all other competing lines, hereby agreeing never to make any other connection, alliance, or business agreement with any competing or connecting line to the prejudice or injury of the party of the first part.

Sixth. The parties hereto mutually agree that their respective lines of road, though distinct in corporate existence and manage-

ment, shall be operated forever in good faith, so as to afford to each other all reasonable facilities for business in the interchange of cars, and all reasonable accommodations, and to strive to control business so as to mutually aid and augment the profits of each,
297 hereby agreeing that in case of any disagreement or difference of opinion as to the intent of this contract, and their respective rights and duties under the same, to refer their differences to a friendly arbitration, and abide by the decision of such arbitrators.

"In witness whereof, the parties hereto have caused this agreement to be signed by the president and secretary of their respective companies, this 3d day of March, 1871.

"THE ST. PAUL AND SIOUX CITY R. R. CO.,

[SEAL.] "By E. F. DRAKE, *Pres.*

"GEO. A. HAMILTON, *Sec.*

"THE SIOUX CITY AND ST. PAUL R. R. CO.,

[SEAL.] "By E. F. DRAKE, *Pres.*

"GEO. A. HAMILTON, *Asst. Sec.*"

In the spring of 1871, the survey and preparation for construction beyond St. James was resumed by the said Sioux City and St. Paul Railroad Company. By reason of the difficulty of construct-
298 ing and of operating the road after construction upon the line around the bend Des Moines river, as it had been surveyed the summer before, and after the contract for construction upon such line had been let, this company adopted a line for construction, crossing that river further south, deflecting from the line of location, as designated on the duplicate map filed in March, 1859, very considerably west of range 35.

The line as actually constructed is also shown on Exhibit A, attached to the complaint in this action. Pursuant to this agreement, the line of railroad from St. James to the south line of the State, as shown upon such Exhibit A, was constructed. During the year 1871 such construction was completed to within ten miles (by the line of road) of the State line, and in May or June, 1872, and has ever since been, operated under such agreement.

299 The construction was from St. James southwesterly until it reached the State line.

The Governor of the State certified to the Secretary of the Interior that the several sections of each of said lines of railroad were constructed in accordance with, and as required by, section 4 of the act of Congress of March 3d, 1857.

Such construction to the south line of the State was completed within the time prescribed by the several acts of Congress and of the State Legislature.

All the lands in controversy lie within the 20-mile limits of the location made by the Southern Minnesota Railroad Company, as indicated on the duplicate map filed March 5th, 1859, as such limits were defined by the action of the Department, as before found, August 10th, 1865.

All the land east of range 38 lie within the 15-mile limits so in-

dicated, and all west of range 37 lie between the 15 and 20-mile limits so indicated.

300 All the lands west of range 37, which are within the six-mile limits of the original located—not constructed—line of the plaintiff, as above indicated, are more than 20 miles from the constructed road of the Sioux City and St. Paul Railroad Company, and all other lands west of said range 37, and outside such six-mile limits, excepting the N. ½ of N. W. ¼ Sec. 17, town. 107, range 38, and sections 13, 23, and the north half of 27, in township 107, range 39, are more than 20 miles from the constructed road of the Sioux City and St. Paul Railroad Company.

This defendant, The St. Paul and Sioux City Railroad Company, never constructed its line of road beyond St. James, and it was determined not to construct the line of its road beyond that point, and the only line constructed beyond that point is that of the Sioux City and St. Paul Railroad Company. In the making of the surveys by the St. Paul and Sioux City and the Sioux City

301 and St. Paul Railroad Companies, in 1870 and 1871, preliminary to actual construction, and in the subsequent construction of the line of road, the located line of 1858 was recognized as the line of location, in accordance with which it was understood the land grant was to be adjusted, and it was the purpose to adhere as closely to that line as was practicable, consistent with obtaining a reasonably direct and feasible route to the southern boundary of the State in the direction of the mouth of the Big Sioux river. The line of location made in 1858 was not the most direct or feasible or practicable route for construction.

The abrupt deflection of the line of construction from such former line, found in range 36, was made for engineering reasons to secure a more practicable crossing of the Des Moines river than that where such former line was located. The land grant to

302 each of these corporations (parties herein) is deficient after appropriating all the lands to which either is entitled under the grant, and is so far deficient that the lands in controversy in this action would not make the grant of either full.

At every point east of the west line of range 31, after appropriating all the lands within all the limits of each road up to and as far west as such point, the grant at such point is deficient, and it is so far deficient at the west line of range 31 that all the lands in controversy would not make it full.

Up to a point as far west as the most western tract of land in controversy, after appropriating all the lands to which the plaintiff is entitled under the grant, the grant is so far deficient that the lands in controversy would make it full. The grant to the defendant's line of road for the distance between the eastern terminus, and the west line of range 31 is so far deficient that all the lands de-

303 scribed in the complaint would not make it full, including all the lands within the deficiency limits in the entire grant.

On the 22d day of March, 1858, the duly constituted agent of the State, acting also in behalf of these corporations, duly elected to take

and selected for indemnity purposes the odd-numbered sections within the fifteen-mile limits which then bounded the grant.

Since the filing in the General Land Office, in 1865, of the duplicate map of location of the Southern Minnesota Railroad Company, and affixing thereto of the Governor's certificate as above found, on the 10th day of August of that year, the line then laid down as the line of definite location of such road has been so recognized and treated by the Department of the Interior, and the land limits fixed with reference thereto as hereinbefore found, have been recognized and treated as the proper limits of the grant to aid in the con-
304 struction of such line and the adjustment of the grant made in accordance therewith *in accordance therewith*. In accordance with such limits so fixed, lands have been certified by the Secretary of the Interior to the State, and the State executive, deeds of such lands have been executed to the defendant herein, and to the Sioux City and St. Paul Railroad Company.

Such deeds to the Sioux City and St. Paul Railroad Company have been made of more than 200,000 acres of lands lying within the six-mile limits, the line originally located as before found, in accordance with the terms of the written contract hereinbefore set forth, and to this defendant of many thousand acres of lands lying outside such limits and within the twenty-mile limits. And long before any construction of any line of railroad beyond St. James, a larger quantity of land in all the ranges from range 31 west-
305 ward to range 41, and beyond and within the fifteen and the twenty-mile limits, fixed as aforesaid, had been certified to the State from the Department of the Interior as indemnity lands, granted to aid in the construction of defendant's line of road; and deeds of same to the defendant had been executed by the Governor and delivered.

Lands lying outside the six-mile limits of both roads (plaintiff's and defendant's), as hereinbefore indicated, through the several ranges in which are the lands in controversy, but within the twenty-mile limits of both lines, have been certified to the State and deeded to both companies in moieties, the undivided one-half to each company.

Prior to the commencement of the controversy between these parties in respect to these lands in the Department, as will be here-
after found, the general practice of the Department of the In-
306 terior in respect to the certifying of lands for the benefit of land-grant roads claiming under the same grant and under grants similar to the grant of 1857, before referred to, have been as follows:

Where the granted land limits of one road overlapped the same limits of another road, the lands in the common limits were certified for the benefit of both roads as tenants in common, each taking an undivided one-half. For instance, lands falling within the six-mile limits of each of two roads (each having a six-mile grant) has been awarded to both in common. So lands falling within the fifteen-mile limits of each of two roads (having a grant of six alternate sections to the mile, with a limit of fifteen miles for indemnity purposes)

have been awarded and certified to both as tenants in common. Lands falling within the granted (say six miles) limits (as distinguished from indemnity limits) of one road and within the
307 indemnity (say fifteen miles) limits of another road (outside of such granted limits) have been awarded and certified for the benefit of the first company within whose granted land limits the lands are. In such cases priority of location was not considered as determining rights in respect to such conflicting lands.

The lines of plaintiff's and defendant's roads cross each other in range 26, and at all points between ranges 24 and 32 the limits of plaintiff and defendant conflicted. The same practice above referred to was observed in the certifying to the State of lands lying within such conflicting limits, and deeds of such lands were executed by the Governor of the State to both of these companies, and received by them, in accordance with such practice.

No controversy at any time arose as between these corporations (until that involving the right to the lands in question in
308 this action), nor was any question raised by either as to the rights of either, nor as to which, if either, company had made the first definite location of its line of road; but both companies acquiesced in, and acted in, accordance with the practice before referred to until the controversy in respect to these lands now in question commenced in May, 1872; and not until such contest arose did pl'ff assert any claim that the line indicated on Ex. A, attached to the complaint, as the alleged surveyed line of the S. M. (now St. P. & S. C.) R. R., was not the proper definitely located line of defendant, but accepted conveyances of land within limits common to both roads (upon such location), in accordance with the above State rule of division in cases of overlapping limits.

Through ranges 29, 30, and 31 defendant's line of road was located on the following dates, viz:

Range 29, June 20th and 22d, 1857; range 30, June 22d
309 and 23d, 1857, and range 31, June 24th, 25th, and 29th, 1857.

The line of the plaintiff's road through the same range was located as follows:

Range 29, June 12th, 13th, and 22d, 1857.

Range 30, June 12th, 15th, 1857.

Range 31, June 15th, 17th, and 18th, 1857.

Within those three ranges there were lands within the six-mile limits of both roads, and also within the fifteen-mile limits of both roads, certified to the State, and deeded to the two corporations in accordance with the practice above designated, one undivided $\frac{1}{2}$ to each company. When such certification had been made to the State from the Department of the Interior the defendant applied for, and obtained, deeds to itself of the undivided $\frac{1}{2}$ of such lands in accordance with the certification, & has since retained as its own the lands so certified & deeded.

If the plaintiff had obtained all the land certified to the State, under the grants heretofore referred to, in these three ranges
310 which fall within its land limits, it would have obtained some

thirty-five thousand acres more than it has obtained in those three ranges under the practice and rule actually applied as above set forth.

On or about the 23d day of May, 1872, this defendant prepared a list of the lands in controversy in this action, and presented the same to the register and receiver of the proper district land office for certification by them as lands selected by it for indemnity purposes.

At this time it was the practice of the Department of the Interior, before it certified lands to the State under the grants before referred to, to require the State, or its grantees, to make selections in this manner of lands desired to be certified pursuant to the provisions of such grant, and upon such certification by the officers of the local office to require the payment of the proper fees to them by the applicant. Such lists when certified by the local officers were sent to the General Land Office, and if found free from
311 conflict were submitted for the approval of the Secretary of the Interior. Thus the lands were certified to the State upon the presentation of such list by the defendant for certification. The local officers refused at that time to certify the selection, for the reason that they deemed that there were conflicting rights in the plaintiff in respect to such lands.

On the same day, and very shortly after such action on the part of the defendant, the plaintiff presented at the same local land office a list of the lands in controversy, with other lands for certification, in accordance with such practice of the Department, and paid to the local officers the proper fees upon such selection.

Upon such selection made by the parties hereto, a contest arose respecting the rights of the respective parties to the land in question, which was prosecuted between these parties before the Land Department at Washington, and upon appeal taken by this defendant from the decision of the Commissioner, before the Secretary of the
312 Interior. Upon a hearing had before the Secretary of the Interior in April, 1873, the Secretary found that the line of definite location along the lands in controversy was first made by this plaintiff, and thereupon awarded the lands in question to this plaintiff upon the ground. Upon the application of this defendant a rehearing was had before the Secretary in such matter, and further evidence submitted on the part of this defendant relative to the location of the line of its road past the lands in controversy. As part of the evidence so presented was the map of the location of the Southern Minnesota railroad, certified March 5th, 1859, and filed in the General Land Office April 13, 1859, and which had been for a time lost, as before found herein, but which, between the times of the former hearing before the Secretary and this rehearing, had been found in one of the rooms of the Land Department, apart from the general records of that character of the Department.
313 Upon such rehearing, and upon the evidence then submitted, the Secretary of the Interior made his decision, November 20, 1873, finding the fact to be "that the line of the St. Paul and Sioux City railroad was first located along the lands in controversy, and that its road was first constructed along said lands," and from these

premises concluded and decided that it, the St. Paul and Sioux City Railroad Company, had the best title to the lands in question, set aside his former decision in favor of this plaintiff, and directed the lands to be certified to the State of Minnesota for the use of the said St. Paul and Sioux City Railroad Company.

Pursuant to such determination and direction the Commissioner of the General Land Office, on the 9th day of May, 1874, presented to the Secretary of the Interior, to be certified to the State of Minnesota, the lands in controversy in this action as "lands selected
314 by the agent of the State of Minnesota outside of the six and within the fifteen and twenty-mile limits, under the act of Congress approved March 3d, 1857 (here follows title of act as above given), and the 7th section of the act approved May 12th, 1864 (entitled as above), the said selections being from the lands of the United States, in alternate sections, designated by odd numbers, most contiguous to the tier of sections within the six sections in width on each side of the railroad from St. Paul and St. Anthony *via* Minneapolis to a convenient point of junction west of the Mississippi river, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux river, now known as the St. Paul and Sioux City railroad, and being in lieu of the land in alternate sections legally sold, or to which the right of pre-emption had legally attached, prior to the period at which the rights of the State
315 inured under said grant; and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said acts of March 3d, 1857, May 12th, 1864, and July 13th, 1866, subject to all its conditions, and to any valid interfering right which may exist to any of the tracts embraced in the foregoing list."

The list so presented for approval was entitled "List of lands in the district of lands subject to sale at New Ulm, Jackson, and Red Wood Falls, outside of the six and within the fifteen and twenty mile limits of the reserve, to satisfy the grant made to the Territory of Minnesota by the act of Congress, approved the 3d of March, 1857, entitled 'An act granting public lands in alternate sections to the Territory of Minnesota, to aid in the construction of the St. Paul and Sioux City railroad,' and the 7th section of the act of May 12th, 1864, being the lands selected by the agent of the Governor
316 of the State of Minnesota from the lands of the United States, in alternate sections and parts of sections, designated by odd numbers, nearest to their tier of sections within six sections in width on each side of the railroad from ——, and in lieu of the lands in alternate sections, designated by odd numbers, within said six sections in width, which the United States had legally sold or otherwise appropriated, or to which the rights of preemption have attached."

Such certification was approved by the Secretary of the Interior on the 14th day of May, 1874, and transmitted to the State of Minnesota, and was filed in the proper office of the State on the 16th day of December, 1874. Of the lands therein embraced 53,111 $\frac{34}{100}$ acres lie within the 15-mile limits before designated, and 19,466 $\frac{95}{100}$ acres

within the 20-mile limits. Upon such certification, and in accordance therewith, the Governor of the State of Minnesota was, at the time of the commencement of this action, about to exe-
317 cute deeds of conveyance of the lands in controversy to this defendant, and would have done so had not the defendant been enjoined by the court at the time of the commencement of this action from receiving such deed.

On the first day of January, 1875, was executed between the defendant, the St. Paul and Sioux City Railroad Company, and Charles Scheffer, one of the original defendants in this action, the agreement, a copy of which is attached to the answer herein, and referred to in paragraph 19 of the answer to the last amended complaint. During the pleading of this action the said Charles Scheffer died, and Charles H. Bigelow having been duly appointed trustee in place of such Charles Scheffer, deceased, was made a party defendant in this action and appeared therein.

The lands in controversy in this action are the same lands,
318 in part, referred to and assumed to be conveyed in trust by such agreement.

Since the commencement of this action another similar agreement has been executed between the same parties to secure the holders of certain preferred stock issued by the said St. Paul and Sioux City Railroad Company, together these two agreements, include all the lands in controversy, and would charge all such lands, if the title shall be found to be in said railroad company, with the trust thereby created.

Only by virtue of these two agreements would the title to the land in controversy become encumbered if it should be held to be in this defendant corporation.

The defendants, Thomas A. Scott, William R. Marshall, and Horace Hall, neither have nor claim any interest or lien upon the lands in controversy.

The defendant, Geo. P. Wilson, is the attorney-general of the State of Minnesota.

As matters of law applicable to this case, I hold:

319 I. That the act of Congress of March 3d, 1857, was in itself a grant *in presenti* to the Territory of lands to aid in the construction of the several lines of railroad particularly mentioned. At the time of the passage of such act the particular lands thus granted by the General Government to the Territory remained yet to be designated by the definite fixing of the lines or routes of said road and (as to indemnity lands) by selection and the approval of the Secretary of the Interior. Schulenburg *vs.* Harriman, 21 Wall., 44; Leavenworth, Lawrence and — R. R. Co. *vs.* U. S., 92 U. S. R., 733. Upon the performance of the conditions necessary to give precision to the grant, the Territory (or State) became, by virtue of the act itself, vested of the fee of the particular lands thus indicated, which it thenceforth held, charged with the trust that they should be used and disposed of for the specific purposes indi-
320 cated in such act. Such subsequent acts necessary to make certain the precise land falling under the operation of the

grant relate to the act itself (of Congress) as that which effects the transfer of the title. Johnson *vs.* Ballou, 28 Mich., 379, 396.

But while the act of Congress is to be construed as a present grant of land to the Territory, yet it was not intended to, nor did it effect a suspension of the power of the United States to dispose of any lands (prior to the performance of those conditions necessary to fix upon precise lands the grant) under the then existing pre-emption and homestead laws, or other laws relating to the disposal of the public lands. 8 Opinions of Att'y General, 245–6.

The act of Congress did not prescribe, except by the general terms, "when the lines or routes of said roads and branches are definitely fixed," what acts on the part of the State or of the railroad
321 companies should serve to designate or mark the precise limits of the grant, and hence suspend all further alienation by the General Government of the lands thus falling under the operation of the grant; nor did it indicate in what manner the proof of the performance of such conditions should be placed before the proper department of the Government to enable it to take proper action thereon. With this reserved power of sale and disposal in the General Government, in order to render this grant effectual and operative in favor of the State, to save it from becoming diverted to private settlements and entry under existing laws, it was necessary not only that the lines or routes upon which such roads were to be constructed should be fixed, but that the General Government should be properly advised of such fact, and that it should take action upon it, both by withdrawing from sale, pre-emption, and home-
322 stead entry the proper lands, falling within the limits of the grant, and by raising the price of the lands remaining to the United States, within the proper limits, to double minimum price.

That it was the intention of Congress that the Land Department of the Government should determine in regard to the performance of such conditions necessary to give precision to the grant, and hence to control the further action of the Government in the disposal of the public lands, may be inferred not only from the absence of any provision in the act itself pointing out the steps to be taken, but from the general legislation of Congress and the practice that has been adopted under it. By an act of July 4, 1836, entitled "An act to reorganize the General Land Office," it had been provided that "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior,
323 all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of lands, and issuing of patents for all grants of land under the authority of the Government." (R. S. of the U. S., title XI, ch. 3, sec. 453.)

I hence hold—

II. That the action of the Land Department of the General Government as to the fact of the location of the lines of both the plaintiff and defendant corporations, (the Transit and the Southern Min-

nesota railroads), and as to the times when such locations were made, cannot now be reviewed or set aside by this court, at least in the absence of fraud in the proceedings upon which such determination was made, I have not found such fraud shown in this case. The facts have become *res adjudicata*.

Leach *vs.* Ranch, 3 Minn., 448.
Clark *vs.* Hall, 19 Mich., 356.
Schulenburg *vs.* Harriman, *supra*.
Johnson *vs.* Tousley, 13 Wall., 72.
324 Shepley *vs.* Cowan, 1 Otto, 330.
Hosmer *vs.* Wallace, 47 Cal., 461.
Fremont and Mills Counties *vs.* The Bur. & Mo. R. R. Co., 22 Iowa, 91.
French *vs.* Fryan, 93 U. S., 169.

III. That the parties are not concluded by the determination of the officers of the Department of the Interior as to the law of the case heard and determined before them; and that a court exercising equity jurisdiction, in a case properly presenting for adjudication the rights of parties as between themselves, whether the decision of the department was based upon a correct construction of the law applicable to the case.

IV. That the defendant corporation is not estopped by any fact or facts established in this case from asserting the claims that priority of location gives superior rights in respect to the lands in controversy.

The case does not present all of the conditions necessary to constitute an estoppel *in pais*. While it appears that both
325 parties have heretofore given to the land grant acts a construction different from that now invoked by the defendant, it does not appear that by any act, course of conduct, or omission to act, on the part of the defendant, the plaintiff has been induced to do, or refrain from doing, anything to its prejudice.

Duzell *vs.* Odell, 3 Hill., 215.
Hawkins *vs.* Methodist Episcopal Church, 23 Minn. R., 256–8.
Bigelow on Est., 1st ed., p. 480.

The facts upon which an estoppel is claimed to arise must be proved; they are not to be inferred.

I hold that the case does not fall within the principle that one may not occupy inconsistent positions, or assert inconsistent remedies, as against another.

There has not been given to the defendant an election to be exercised by it as to what should be the construction of the land grant acts. The law itself, as it was, and not as either party might
326 interpret it, was to determine the title to lands falling within the limits of the grants.

If the defendant has heretofore erroneously interpreted the law and received conveyances of certain lands, to which it had no title or right as against this plaintiff, the plaintiff cannot for that reason

ask that the defendant be held to such erroneous construction in the administration of the grant in respect to other lands.

V. That under the act of March 3d, 1857, priority of location by one of the roads therein named does not confer a right to lands falling within the limits of the grant, as defined by such location, superior to that of another of such roads subsequently but within the time limited by the grant located.

The practical construction of this and like congressional acts was for many years in accordance with this principle. This fact is entitled to great weight, as indicating the true construction
327 of the law, although it is not conclusive.

See, also, the award of Miller, J., in the case of The McGregor and Mo. River Railroad Company *vs.* The Sioux City and St. Paul R. R. Co. *et als.*

Also opinion of Dillon, J., in Sioux City and Pacific Railroad Company *vs.* Union Pacific Railroad Company, in the circuit court, District of Nebraska.

Loring *vs.* Benedict, 15 Minn., 203.

City of Faribault *vs.* Misener, 20 Ib., 401.

VI. That the rule adopted and followed by the Department of the Interior, prior to the commencement of the controversy, concerning the lands in question in this case, as to the modes of disposing of lands found to be within conflicting limits of two of the roads referred to in the granting act, as it is shown in the foregoing findings of fact, is the proper rule to be applied in such cases: that is to say: Lands in place or lying within the limits of the grant
328 (as distinguished from indemnity limits) of one road and outside the granted limits of another road, belong to the former road; lands lying within the common limits of both roads enure to the benefit of each alike, and they take as tenants in common.

Hence all of the lands within the six-mile limits of the plaintiff's road, as shown in the foregoing findings of fact, were lands granted to the State by the act of March 3d, 1857, to aid in the construction of its line of road, and can "be applied to no other purpose whatever." As to such lands, the plaintiff is already vested with the fee by virtue of the act of Congress, and the defendant is not entitled to receive from the Governor of the State a deed, or other evidence of title itself.

VII. The act of the State Legislature by which the grant made to the Territory was in terms granted, vested in and transferred
329 to these corporations, while they would have been inoperative to effect a transfer of more than 120 sections of land in the first instance, and prior to the construction, are now to be construed as having effected the grants which they purport to make, and to have passed to the respective companies all that by the congressional grants had been conferred upon the State. The roads have long since been constructed and the State enactment is operative as a grant, and the legal title to these lands is no longer in the State.

VIII. That the act of March 5th, 1863, (ch. 50, special laws, 1869,)

is not constitutional, as being contrary to the provisions of sec. 27, art. 4, of the constitution of the State.

Farnsworth *vs.* N. Pa. R. R. Co., 9 S. N., 49.
B'd Supervisors Ramsey Co. *vs.* Heenan, 2 Minn. R., 330.
Talte *vs.* Stout, 7 Ib., 465.
State *vs.* Gut., 13 Ib., 24.
State *vs.* Cassidy, 22 Ib., 312.

That the two corporations entering into the contract set
330 forth in the foregoing findings of fact had power so to contract. That it is immaterial, so far as any question involved in this action are concerned, whether the lines of road referred to in *in* the several congressional and legislative acts were constructed beyond St. James, directly by this defendant corporation, or by the Sioux City and St. Paul Railroad Company under such contract.

The entire line of railroad having been constructed to the south line of the State, this defendant is entitled to go forward in the ten-mile indemnity belt, within the twenty-mile limits, as fixed by the land department of the Government beyond its actual terminus at St. James, and take lands selected indemnity in lieu of those lying in place east of St. James, which had been sold by the United States, or to which pre-emption or homestead rights had attached.

IX. That the twenty-mile limits of the road as fixed by the
331 action of the Department in this case, must define the boundary of such indemnity belt, to which defendant may resort for such purpose; and in considering whether particular lands selected for indemnity are "within twenty miles of the line of said road," or at a "greater distance therefrom," we are, in this case, to examine only with reference to that line which for so many years the Land Department of the Government has recognized as the line of definite location of such road, and upon which alone this land grant has been administered, both by the General and State Governments, and with the acquiesence, as it would seem, until this controversy arose, of the parties to this litigation.

X. Under the act of 1857, the interest of one of the roads therein named, in a specific belt of indemnity lands, as also in the lands in place, attached as against a subsequent grant from the General Government, only "when the line of route of said road became
332 definitely fixed" through the particular territory, so as to enable the proper department of the Government to prescribe "limits," and to take such action as was necessary in administering the grant.

The survey of the plaintiff's line west of range 37 not having been made until November, 1866, it had not acquired, as against this defendant, claiming under the intermediate act of 1864, any vested right in respect to lands west of that range and outside of the six-mile limits of the former (plaintiff's) road, as it was finally located, and as to such lands, by virtue of the acts of Congress of 1857 and 1864, and the legislative acts above referred to, both companies are entitled alike to resort to make selections for indemnity. The defendant did not, by the prior location of its line, acquire a vested

interest or title to these lands as against the plaintiff, claiming under the act of March 3d, 1857.

333 XI. While the title to the lands in controversy has already passed from the General Government and from the State to the respective corporations, parties herein, yet a deed from the Governor of the State to this defendant of lands in controversy to which it is not entitled would, under the facts found, impose a cloud upon the title of the plaintiff, and work such injury as that this court ought to exercise its authority to prevent such results.

XII. If there were a defect of parties, it appears on the face of the complaint, and defendants, not having demurred on that ground, cannot avail themselves of such objection by answer.

De Key *et al. vs.* Strong *et al.*, 37 N. Y., 372.

XIII. There is not a defect of parties. The title concerning which the court is called to adjudicate is not in the State. Of course the State cannot be sued in its own courts; nor do we assume any

334 jurisdiction over the State executive, but only to adjudicate as between those who are parties to this action.

XIV. That, as to the defendants, Thomas A. Scott, William R. Marshall, and Horace Hall, the complainant, should be dismissed.

XV. That this plaintiff is the owner in fee of all of the lands described in Schedule "B," attached to the complaint, excepting those lands described in Schedule "C," attached to the complaint; and that none of the defendants have any right, title, interest, or estate in or to such lands (excepting those described in Schedule "C"), and the plaintiff is entitled to receive from the Governor of the State a deed of conveyance of such lands (except as to those described in Schedule "C"), and that the defendant, the St. Paul and Sioux City Railroad Company, its officers, agents, and servants, should be, by the judgment of this court, forever restrained from applying

335 for or receiving or accepting from the Governor of the State a deed of conveyance of such lands (not described in Schedule "C.")

XVI. That this plaintiff and the defendants, the St. Paul and Sioux City Railroad Company, are each the owners in fee of the undivided one-half of each and every piece and parcel of land described in Schedule "C," attached to the complaint herein, and also of the northeast quarter of section 17, township 107, range 40 (which was brought into this action by amendment pending the trial), and each of such parties is entitled to receive from the Governor of the State a deed of conveyance of such undivided one-half of such lands.

It is ordered, therefore, that judgment be entered in this action as above indicated. But it is further ordered that a stay of proceedings for 30 days from the filing of this decision, be & is granted, to enable either party to prepare & serve a proposed case or bill

336 of exceptions, & to move for a new trial thereon, & in the meantime, such judgment will not be entered.

Dated May 21st, 1878.

D. A. DICKINSON,

Judge District Court, Sixth Judicial District.

The above, with the amendments inserted, is a true copy of the first original findings in this case, & I so stipulate.

Winona, March 18, 1879.

(Signed) THOMAS WILSON,
Pl'ff's Att'y.

(Signed) E. C. PALMER,
App'l't's Att'y.

337 *Additional Findings.*

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth Judicial District.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, Geo. P. Wilson, and Charles H. Bigelow.

After the making and filing of the findings of the court, conclusions of law, and order for judgment in this action, the defendant having proposed a bill of exceptions, the plaintiff having offered amendments thereto, and the same having been settled before the court, the plaintiff also having proposed a bill of exceptions, and the defendant having offered amendments thereto, and the court being engaged in the settlement of such bill of exceptions
338 proposed on the part of the plaintiff, and having under consideration in matter relating to the selection by the defendant of the lands in controversy, which (selection) had been found by the court to have been made, the counsel for the respective parties being before the court, and it having been suggested on the part of the plaintiff that in making its findings of fact in the particular above referred to, the court had failed to correctly apprehend or to consider the evidence upon such question of fact, and that the finding of the fact already made was not supported by the evidence in the case, the court thereupon suggested a reconsideration of such question of fact, and by order, dated August 29, 1878, granted leave to the plaintiff to move the court for an amendment and correction of its findings in such particular; and notice of the making of such motion having been served upon defendants' coun-
339 sel, and the notice having been made accordingly, and the court having overruled defendants' objections to the motion, and thereafter having heard further argument by counsel for the respective parties upon the questions involved in such motion, and having further considered the same, the following findings of fact are now made in this case, thereby amending and correcting the findings heretofore made, so far as these findings are opposed to or inconsistent with such former findings.

Neither the State nor the defendant, nor any agent of the State or of the defendant, ever selected for the defendant or on account of the location or construction of its line of road any of the lands in

controversy in this action lying west of the west line of range 37, nor was any such selection made of the south half of the southeast quarter, or the south half of the southwest quarter of section 3, township 107, range 35.

The plaintiff having also in the notice of motion for correction of findings above indicated, notified defendant the motion
340 would be made, that the court find specifically as facts certain matters which had been by the parties embodied in two written stipulations made before the trial of the cause, and defendant having objected to the court entertaining such motion, but such objections being overruled, and after having heard counsel upon the matters involved in such motion, and considering that the findings heretofore made do not embrace all of the facts stipulated by the parties which are in accordance with such stipulations of the parties, to wit:

That before the line of road of either the Winona and St. Peter Railroad Company, or of the St. Paul and Sioux City Railroad Company was definitely located or fixed to any point between the western line of range 31 and the western line of range 40, the right of pre-emption had attached to, and the United States had sold and disposed of so many of the lands lying within twenty miles
341 of each of said roads that the remaining alternate sections within twenty miles of either were insufficient to make up the number of acres to which either road was or is entitled under the laws of the United States or of Minnesota, on account of the building of its road to said western line of range 40, and all of the lands in controversy would not make up such deficiency to either road.

That the time when the survey of the township and subdivision lines in the township and ranges named in the following tables were run by the United States deputy surveyors, and the dates of the approval of such surveys by the proper department were, as shown in such table, to wit:

Township.	Range.	Boundary.	Township Lines. From—	Township Lines. To—	Subdivision Lines. From—	Subdivision Lines. To—	Dates of approval.
105	36	S.	Feb. 4, '57	Nov. 10, '57	June 23, '59	July 1, '59	Dec. 19, '59
		E. N. W.	Aug. 13, '57	Jan. 11, '58			
106	36	N. E. W. S.	Aug. 13, '57	Jan. 11, '58	July 2, '59	July 12, '59	Dec. 19, '59
105	37	S.	Feb. 4, '57	Nov. 10, '57	June 14, '52	June 22, '59	Nov. 22, '59
		E. N. W.	Aug. 13, '57	Jan. 11, '58			
105	38	S.	Feb. 4, '57	Nov. 10, '57	June 22, '59	July 4, '59	Nov. 22, '59
		E. N. W.	Aug. 13, '57	Jan. 11, '58			
108	36	S. E. W.	Aug. 13, '57	Jan. 11, '58	Aug. 12, '59	Aug. 19, '59	Dec. 24, '59
		N.	Sept. 25, '57	Oct. 10, '57			
108	37	S. E. W.	Aug. 13, '57	Jan. 11, '58	Aug. 23, '59	Aug. 31, '59	Dec. 24, '59
		N.	Sept. 25, '57	Oct. 10, '57			
109	37	S.	Sept. 25, '57	Oct. 10, '57	July 28, '59	Aug. 4, '59	Dec. 10, '59
		E.	May 18, '58	June 1, '58			
		N. W.	June 1, '58	June 7, '58			
108	38	S. E.	Aug. 13, '57	Jan. 11, '58	Sept. 2, '59	Sept. 9, '59	Dec. 24, '59
		N. W.	Sept. 25, '57	Oct. 10, '57			
109	38	S. W.	Sept. 25, '57	Oct. 10, '57	Aug. 5, '59	Aug. 12, '59	Dec. 10, '59
		E. N.	June 1, '58	June 7, '58			
108	39	E. W.	Sept. 25, '57	Oct. 10, '57	July 25, '61	Aug. 6, '61	Oct. 17, '61
		N.	Sept. 23, '58	Sept. 23, '58			
		S.	July 5, '61	July 23, '61			
109	39	E.	Sept. 28, '57	Oct. 4, '57	July 4, '67	July 9, '67	Aug. 21, '67
		S.	Sept. 23, '58	Sept. 23, '58			
		N. W.	June 20, '66	June 20, '66			
109	40	S.	Sept. 23, '58	Sept. 23, '58	July 29, '67	Aug. 2, '67	Oct. 10, '67
		E.	June 20, '66	June 20, '66			
		N.	June 28, '66	June 28, '66			
		W.	June 27, '66	June 27, '66			
110	40	E.	June 21, '66	June 22, '66	Aug. 3, '67	Aug. 7, '67	Oct. 10, '67
		S. N. W.	June 28, '66	June 30, '66			

343 That the Government survey of the following townships was approved on the following dates hereinafter designated, viz:

Townships.	Ranges.	Month.	Day.	Year.
106	32	September	20	1858
107	32	September	20	1858
106	33	September	20	1858
106	34	November	6	1858
105	35	January	11	1859
106	35	December	14	1858
105	36	December	19	1859
106	36	December	19	1859
105	37	November	22	1859
104	38	March	17	1859
105	38	November	22	1859
109	32	October	7	1858
100	32	September	25	1859
108	33	November	26	1858
109	33	January	15	1859
108	34	November	6	1858
109	34	October	7	1858
108	35	November	16	1858
109	35	November	6	1858
108	36	December	24	1859
109	36	November	6	1858
108	37	December	24	1859
109	37	December	10	1859
108	38	December	24	1859
109	38	December	10	1859
108	39	December	17	1861
109	39	August	21	1867
109	40	October	1	1867
110	40	October	16	1867

344 It having been suggested on the part of the defendant that the court in its original findings of fact omitted to make findings upon the subject about to be indicated, these further additional findings of fact are now made, to wit:

In June, 1864, the president of the new organization, The Minnesota Valley Railroad Company, not then knowing all that had been done by the Southern Minnesota Railroad Company in respect to location of a line of road, and supposing that the line of the road had not been definitely located beyond range 31, and understanding

that the lands which might be found to fall within the limits of the grants of 1857 and 1864 were being rapidly disposed of by the Government, took steps to secure a temporary withdrawal of the lands which it was expected would fall within the proper limits upon a line of location which he then supposed the company were then about to make. Such temporary withdrawal was sought for
345 the purpose of putting an end to such disposal of the lands to pre-emptors and others, until upon a definite line of location the precise limits could be defined and a permanent withdrawal of the granted lands affected. To this end President Thompson caused a map to be made indicating a "proposed route" of the road crossing that part of the line from St. Paul to range 32, and also running westward and southerly to the south line of the State, with limits of 6, 15, and 20 miles, also indicated with reference to such route. The line indicated on such map, between the west line of range 31 and the west line of range 39, was identical with the line which had been laid down on the map filed in the General Land Office April 13, 1859, and from such point on the west line of range 39, the line indicated on this map (of 1864) ran to the south line of the State in the direction of Sioux City. This map was made without any survey other than had been previously made, as particularly found in the former findings of fact, the notes and
346 maps of the former survey being used in the preparation of this map of 1864.

On the 21st of June, 1864, President Thompson, acting in his official capacity, forwarded this map to the Governor of the State, with the suggestion that he should "file this preliminary map at the General Land Office, and in behalf of the State request the Commissioner to withdraw temporarily from sale or pre-emption the lands along the whole line of the road, and so notify the local land officers, with the least possible delay." On the following day (June 22d) the Governor of the State forwarded to the Commissioner of the General Land Office the communication of President Thompson, above referred to, (with the map of 1864,) with the request on the part of the Governor "that the said preliminary map may be filed on behalf of the State of Minnesota, and * * * that the lands therein indicated be temporarily withdrawn along the whole line of the road, and the local land officers be promptly notified to that effect."

347 These communications and *and* the map having been received by the Commissioner of the General Land Office, were by him, on the first of July, 1864, submitted to the Secretary of the Interior, for his instruction in the premises.

On the second July, 1864, the Secretary, in a communication to the Commissioner of the General Land Office, referring to this subject as "the application of the Governor of Minnesota for the withdrawal from market of the public lands for twenty miles on each side of the railroad from Saint Paul and Saint Anthony, *via* Minneapolis, to the southern boundary of the State," directed that the lands be withdrawn from settlement, location, and sale.

Pursuant to such instruction, the Commissioner of the General

Land Office, on the 7th July, 1864, issued orders to the proper district or local officers to "suspend from settlement, location, and sale a body of land about 20 miles in width, as indicated on the enclosed diagram "B." This order was received at the local
348 land offices in the same month (July), and was complied with by the local land officers.

The diagram sent with the above order of the Commissioner of the General Land Office and referred to as Diagram "B" was a township map of the State or Territory upon which was indicated the line of the road as drawn upon the map sent to the department in June, 1864, as above stated; and upon either side of this central line or indicated line of road, not following lines of Government sections or subdivisions thereof, but lines of townships, were drawn lines indicating limits of 6, 15, and 20 miles from such central line. Such suspension of lands by the land department of the Government was not then made for the purpose of indicating that the lands so suspended or withdrawn were the lands to which the State was entitled under the grants of 1857 and 1864 on account of this line of road, but only on account of the supposed deficiency of the grants to arrest the disposal of lands until, upon a fixed and rec-
349 ognized —, the precise limits could be fixed. None of the lands so suspended or withdrawn from market were restored to market until the fixing of precise limits of the grants, in August, 1865, as has been particularly found in the former findings of fact. After the further argument of counsel for the respective parties upon the hearing of the motion of plaintiff before referred to, and upon further consideration by the court, the following additional conclusions of law are found, modifying, so far as they be found to conflict or be inconsistent with what has been before announced, viz.:

XVII. The act of May 12th, 1864, was a present grant of "four additional alternate sections of land per mile;" but although it may be considered that the line of defendant's road had been definitely fixed, yet such additional grant was not, by the act itself, made certain and attached to specific lands, unless by reason of the deficiency in the grant rendering selection in this particular case unnecessary. The lands granted by this act were to be selected from the
350 lands of the United States nearest to the tiers of sections in place granted by the act of 1857, or to the belt of sections taken for indemnity under the latter act. In a case where the indemnity sections enuring to the defendants under the act of 1857, had already been selected or certified to the State, these four additional sections would be selected nearest to such tiers of indemnity sections, so taken. But where resort had not already been had to the indemnity belt of 1857 selections of lands sufficient to make good the grant ten sections per mile might be made, commencing at the exterior line of lands in place (6 mile limits under act of 1857), and taking the requisite number of sections nearest to the tiers of sections in place. In this particular case it is considered and held that the failure of the defendant to make formal selection of the lands in controversy west of range 37, and of the two tracts specific-

ally named in range 35, should not prejudice its claim to
351 such lands for the reason, first, that its grant is so far deficient that all of the lands within the deficiency limits would not make it full; and, second, that the question as to whether the plaintiff or defendant is entitled to these lands, and whether they should be certified to the State on account of either line of road, has been carried by the parties before the proper officers of the Land Department of the Government and Secretary of the Interior, and submitted to investigation and decision there, and the lands have been certified to the State. Whatever may have been the reasons which suggested the requirement of selection of lands for indemnity purposes, or to make good a grant of a given number of sections per mile, as in the act of 1864, whether such reason related to securing a proper administration of the grant as between a single beneficiary and the Government, or to the adjustment of the grant where there were conflicting or adverse claims;
352 whether selection was deemed necessary to define and make certain the precise lands falling under the grant, or was only deemed expedient as a proper step in the process of adjustment, in any or either case the objects to be attained by a formal selection of the lands have been accomplished in the case under consideration, unless the mere act of selection as a step of diligence is to be held to give priority of right, and in respect to this I hold:

XVIII. That, as between two railroad corporations, the building of both of whose lines is sought to be promoted by federal grants like those of 1857 and 1864, and either of which (corporations) would be entitled to make selection for purpose of indemnity, or to make full a grant of a given number of sections, and where the entire belt from which selections are to be made is insufficient to make good the grant of either, neither party, by priority in selecting, acquires a right to the land, to the exclusion of the other, unless, perhaps, where the laches of one party shall have worked to the
353 prejudice of the other.

The ability to make a location of a line of road, and hence of fixing the tract where selections may be made, so far depends in many cases upon circumstances over which the parties can exercise no control—for instance, the progress of the Government surveys—that to make the rule pri-, or, *in tempore potior est injure*, to apply in such cases to the mere act of selection, would often defeat the plain purposes of the grant.

XIX. Again, it is held that so far as relates to the fixing of plaintiff's line of location between ranges 31 and 38 as identifying the lands between these ranges falling under the operation of the grant of 1857, the time when the road was actually surveyed and marked upon the ground is to control, the lines so surveyed having been subsequently adopted and recognized by the Government as its line of location. Such subsequent recognition relates to the princi-
354 pal original act of surveying and marking the line. (Johnson *vs.* Ballew, 28 Michigan R., 377, 396.) This date was April, 1864, and prior to the grant of May 12, 1864, and the lands

in controversy east of range 38, except the south half of the southeast quarter and the south half of the southeast quarter of section 3, 7, 107, 35, being within the six-mile limits of plaintiff's line, would enure to it alone. The two tracts above referred to in Sec. 3 being within the common indemnity limits of both roads, they should take the same as tenants in common.

XX. In respect to the lands in controversy lying west of range 37, the further argument of counsel, and the further consideration which has since been given to the subject, have led to the conclusion that the tenth and sixteenth conclusions of law, as originally found, should be modified. That in respect to such lands, the parties have not equal interests, and that either the plaintiff
355 is entitled to them under the grant of 1857, or the defendant is entitled to them by reason of the grants of 1864, preceding the location of plaintiff's road west of range 37. The reason why the junior grant of 1864 would hold these lands, (outside of def't's 15-mile limits,) notwithstanding the prior grant of 1857, if such is the proper construction of the grants, is to be found, not in the fact that the grant of 1857 was not an actual grant *in presenti*, nor that Congress has manifested any purpose to impair the earlier grant or to deprive the parties of the full benefits originally intended to be secured by it, but in the legal principle that, while a former grant remains undefined by any means and afloat, a succeeding grant of lands identified by an already located line of road or otherwise will take effect upon specific tracts of land to the exclusion of the former. This proposition, as a general principle, is perhaps well established. (Railroad Company *vs.* Freemont County, 9 Wallace, 89, 94.)
356 I have been unable, satisfactorily, to determine whether, except for the peculiar facts in respect to location, which will presently be adverted to, this principle should control and give these lands to the plaintiff, or whether on the other hand the grant of 1864 should be construed as giving the four additional sections, subject to the prior right of the plaintiff to locate its line and take its quota of lands under the act of 1857, under the proviso in respect to reservation of prior appropriated lands, which proviso, as it is contained in the act of 1857, is brought over, and becomes a limiting provision in the act of 1864.

But if the reason upon which the above legal principle rests has been correctly suggested, it would seem that anything which served to identify the lands falling under the operation of the earlier grant before the enactment of the later one would leave no room for the application of the rule. If, now, the proposition already asserted, that for the purposes now under consideration the time of
357 actual location of a line, where followed by the proper steps to secure its recognition by the Government, is to be taken as the date of definite location of such line, be correct, it would seem to follow in this case that the same act of the parties by survey, &c., in April, 1864, which served to mark and make certain the granted lands and indemnity under act of 1857, as claimed by plaintiff, between ranges 31 and 38, also necessarily identified and made certain the lands in controversy west of R. 37, excepting one single

tract, as being lands granted for the construction of plaintiff's road by the act of 1857—if we assume, what has been above held to be the case, that in April, 1864, the line of plaintiff's road was located, so far as location is necessary to give precision to the grant, to the west line of range 37, and look at Exhibit "A," the map attached to the complaint, and which, as has been found, shows
358 the lines of both roads as located as well as constructed, we find the precise terminus point of such location to be in the middle of the west line, town. 108, R. 37. Beyond this point no location or surveys were made until 1866; the ultimate terminal point of the road as fixed by the enactments before referred to was a point on the Big Sioux river south of the 45th parallel of north latitude. No direct line can be drawn, as a glance at Exhibit A or to any map of the State will show, from the middle of the west line of T. 108, R. 37, to any point on the Big Sioux river, which would not include all of the lands in controversy west of range 37 within a 15-mile limit, excepting as to the N. E. $\frac{1}{4}$ of 17, 107, 40, and more, no line of location could be made in any direction from the terminus of this location of 1864 that would not include such lands within a limit of 15 miles, for all of such lands are within 15
359 miles of that terminal point of location of 1864. This being so, it would seem that the location up to the west line of R. 37 in April, 1864, affixed the grant of 1857 to the lands in question; for it was thereby made certain that such lands would fall within the 15-mile limit of the line when it should be extended beyond R. 37. It may be said that the location might never be made beyond R. 37, and the road might never be built. Its former location might be abandoned. But the question is not whether these lands had been earned by construction, nor whether the title of the State was so discharged of the conditions of the grant that it might dispose of the lands, but the question is what is necessary to give precision to grant actually made *in presenti*, and whether these lands were, by the location already made up to range 38, indicated as lands
360 necessarily falling within the grant of 1857, so that as to them the grant could no longer be said to be afloat. If the premises are correctly found from the facts set forth, I see no escape from this conclusion, and hence hold that the survey of plaintiff's line to the west line of range 37, as shown in the findings of facts herein, and the subsequent adoption of such surveyed line, and its recognition by the General Government, had the effect to indicate the lands in question beyond range 37, except as to the said one tract in T. 107, R. 40, as being within the operation of the grant of 1857, and that defendant acquired no interest in them under the act of 1864.

XXI. It is therefore held that as to all of the lands in question, excepting the northeast quarter of section 17, in township 107, range 40, and the south half of the southeast quarter, and the south half of the southwest quarter of section 3, township 107, R.
361 35, the defendants, and none of them, have any right, title, interest, or estate in the same; that plaintiff is the owner in fee of the same, and entitled to receive a deed of conveyance of the

same from the Governor of the State as evidence of its title; that the defendant, The St. Paul and Sioux City Railroad Company, its officers and agents, should be, by the judgment of this court, forever restrained from applying for or receiving or accepting from the Governor of the State a deed of conveyance of such lands.

XXII. As to the lands in section 3, township 107, range 35 last-above-named, that the plaintiff and the defendant corporations are owners in fee each of the undivided one-half thereof and entitled to receive deeds of conveyance of the same.

XXIII. As to the N. E. ¼ of section 17, township 107, range 40, the defendant is owner in fee of the same and entitled to deed of conveyance of the same as evidence of such title.

It is therefore ordered that judgment be entered herein in
362 accordance with the above findings; but in order that opportunity may be afforded for securing a review of the determination of this court, and since both the findings of fact and the final conclusion reached in the case are materially different from the former findings and conclusions, it is ordered that all proceedings upon this decision and order, including the entry of judgment thereon, be stayed for twenty days after the filing of this order, in which either party may prepare a case or further bill of exceptions upon which to move for a new trial.

Dated October 10, 1878.

(Signed) D. A. DICKINSON,
Judge of District Court.

W. C. DURKEE,
Clerk of District Court.

363 *Notice of Motion for New Trial.*

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, 6th Judicial District.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. Scott, Charles Scheffer, Wiliam R. Marshall, Horace Hall, Geo. P. Wilson, and Charles H. Bigelow.

Take notice that pursuant to the order of the judge of said court, bearing date January 4th, 1878, a motion will be made on behalf of the defendants, The St. Paul and Sioux City Railroad Company and Charles H. Bigelow, to vacate and set aside the two several decisions filed in said cause, and each of the same, to wit, the decision filed May 22, 1878, and the decision dated October 10, 1878, and for a new trial of said action upon the following grounds, to wit:

1. Irregularity in the proceedings of the court on the trial of said cause, by which these defendants were prevented from having a fair trial.

364 2. The order of the court allowing said plaintiff to amend its said complaint during said trial and withdraw a written

admission of fact as set forth in the papers on which this motion is made, which order affected the substantial rights of these def'ts, and prevented them from having a fair trial.

3. The order of said court refusing to deny said pl'ff's application to have the trial proceed as if new issues had not been joined, and refusing to grant the def'ts' motion to set aside said notice of trial in that regard, and directing the trial to proceed in the mode set forth in the moving papers herein, whereby the substantial rights of these defendants were effected, and they were prevented from having a fair trial.

4. The action of the court and the orders made in reference to a review of certain findings of fact contained in the decision filed May 22, 1878, and the granting of said motion and the findings made
365 upon matters not previously embraced in any order asked for or presented by either party, whereby these defendants were prevented from having a fair trial and their substantial rights affected.

5. Abuse of discretion by said court appearing in the proceedings and orders hereinbefore specially referred to, and in the moving papers herewith presented and designated.

6. That said decisions are not justified by the evidence, and are contrary to law.

7. That said decision dated Oct. 10th, 1878, is not justified by the evidence, and is contrary to law.

8. That the following finding of fact contained in said decision of Oct. 10, 1878, to wit, "such suspension of limits by the Land Department of the Government was not then made for the purpose of indicating that the lands so suspended or withdrawn were the lands to which the State was entitled under the grants of 1857 & 1864, on account of this line (of road of def't company), but only an
366 account of the supposed deficiency of the grants, to arrest the disposal of lands which would probably fall within the limits of the grants until upon a fixed and recognized location the precise limits could be fixed," is not justified by the evidence, and is contrary to law.

9. Error in law occurring at the trial and excepted to by def'ts.

And take notice that this motion will be made at the time and place appointed in said order dated Jan'y 4, 1878, and upon the pleadings in said cause, the decisions of the court, and the two bills of exceptions filed therein, and upon the affidavit of E. C. Palmer, a copy of which is herewith served upon you.

E. C. PALMER,

Att'y for the St. Paul and Sioux City Railroad Company and Charles H. Bigelow, Def'ts.

To THOMAS WILSON, *Pl'ff's Att'y.*

367 STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth Judicial District.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. Scott, Charles Scheffer, William R. Marshall. Horace Hall, Geo. P. Wilson, and Charles H. Bigelow.

COUNTY OF RAMSAY, *ss:*

E. C. Palmer being sworn, says that he is, and has been, the attorney of record in the above-entitled action since the same was commenced for the defendants therein, save Geo. P. Wilson, who not appear. That said action was commenced in July, 1874, and the complaint was amended two or more times before said cause came on for trial.

That before said cause was brought on for trial the counsel for said parties, after many consultations together on the subject, and after repeated efforts to agree upon such matters as were al-
368 leged in the complaint and answer, finally agreed upon and set forth in writing certain facts and signed the same as counsel, to be used on the trial as evidence and admissions to save the necessity, delay, and expense of making proof thereof, a true copy of which said stipulations, styled "A" & "B" respectively, are set forth in and attached to the bills of exceptions heretofore settled in this cause, and to which reference is hereby made as part of this affidavit. That each of said stipulations contained admissions and material to the issues respectively tendered in said complaint and answer, and were intended to be and were of equal benefit to the two parties litigant in the premises. That among other admissions of facts stipulated as aforesaid were admissions that the plaintiff had constructed its railroad as required by the acts of Congress and of the Territory and State of Minnesota, and completed the same throughout its whole extent; and the corresponding and
369 equivalent admission on the part of said plaintiff that said defendant, The Saint Paul and Sioux City Railroad Company, had constructed and completed its line of road as required by the acts of Congress and of the State and Territory of Minnesota applicable thereto throughout its whole extent, that is to say, from Saint Paul *via* the points named in said acts to the southern line of the State of Minnesota; and defendant evers that he would not have signed said stipulations and made the admissions therein contained in favor of said pl'ff, or any of the same, if the said pl'ff had not made equivalent admissions in favor of his clients, as set forth herein and in said stipulations; that the fact of the making of said admissions relieved said parties, and each of them, from the necessity of making proof of said facts, which would have involved and required great labor, time, and expense on the part of each of them; that the trial of said cause commenced in July, 1875,
370 and continued from time to time until Oct., 1875, and during which period the pl'ff had introduced all its evidence in chief,

including such admissions aforesaid as were in its favor, and had rested its case, and the defendants had introduced a large portion of their evidence, including the said admission of facts which were in their favor as aforesaid, and was examining a witness in chief when the counsel for the pl'ff interrupted such examination, applied to the court, to wit, on or about Oct. 5, 1875, for leave to amend its said complaint and set forth therein new matters not before alleged, and which would materially change the issues to be tried in said action. That def'ts counsel opposed such application, as made too late and at an improper stage of the trial, and as calculated to delay said action and greatly increase the trouble and expense of the trial thereof and prevent said def'ts from having a fair trial
371 and as involving the setting aside of the admission of facts aforesaid then in evidence, and on which def't relied. That said court granted said application, and allowed said pl'ff to make said application, and gave a short time in which to make written motion, and the trial of the case proceeded. That on or about Oct. 7th, 1875, said motion was made, heard, and granted, defendant opposing the same, and without costs or terms on said pl'ff, and said complaint was amended accordingly, and that portion of said stipulation relative to said construction and completion of said defendant company's line of road was stricken out, and the said admissions in favor of said pl'ff, as stated aforesaid, were left in force and binding upon said def'ts. That said complaint was amended by the insertion of such new matter, and the trial of said cause then, on
372 said Oct. 7th, 1877, ceased. That the usual time was given to answer said *said* complaint as last amended, and an answer thereto was, on Dec. 14, 1875, duly served on pl'ff's counsel. That at the general term of said district court, held in June, 1877, said pl'ffs noticed said cause for trial, and placed the same on the calendar of said court for trial, and in said notice, which was otherwise in usual form, stated that he would ask the court to take up and resume the trial of said cause at the point where the same was left on Oct. 7, 1875. That at the opening of said term defendant opposed, and moved that said application be denied, so far as related to the taking up said cause for trial at the point reached on Oct. 7, 1875, and pl'ff's counsel not appearing, the court held said motion of deponent, and did not then decide or pass upon the same. That thereafter, and in August, .1877, said cause was brought on for trial on the appplication of
373 the pl'ff, but without prejudice to the right of said def't to insist on their said motion and at said last date and before said trial had been entered upon, said def't renewed and urged their said motion, and insisted and claimed that said cause should be tried *de novo* upon the new issues made by the new pleadings, and that the evidence theretofore introduced should not and could not properly be considered as introduced or offered in said cause upon said issues as there formed, but said court denied said motion and held that said trial should proceed in the order set forth in said bills of exceptions referred to as aforesaid and made part hereof. That accordingly said trial did proceed in accordance with said order, def'ts accepting thereto, as set forth in said bills of exceptions, and all the

evidence previously introduced (except said admissions so
374 stricken out as aforesaid) was considered by the court as arriving at his findings of facts and conclusions of law filed in said cause. Affiant further says that after said cause was tried as directed in the order of the court, made as aforesaid, the same was fully argued before the court by the respective counsel, and was taken under advisement on or about Sept. 23, 1877, and it was then and there agreed in open court that said judge should draw up his findings of fact and conclusions of law in said case, and make his decision therein, but that the same should, before being filed, be submitted to the counsel of the respective parties in order that they might suggest, each on behalf of his clients, any omission or error of fact, or failure to find every conclusion of law by said judge which said counsel might deem material, and present such suggestions, if any, in writing to the judge, but without argument, to the end that he
375 might consider the same, and incorporate them, or such of them as to him seemed correct, into his said decision before filing the same, and that said decision so reconsidered and changed should then be filed in the office of the clerk, and stand as the decision in said cause. That time should be given for making a case or bill of exceptions, if either party so desired. That on the 26th day of February, 1878, said judge completed and rendered his decision in said cause in writing, and signed the same, and submitted it to counsel for examination and suggestion, in accordance with the understanding aforesaid, and said pl'ff's counsel thereafter made certain suggestions to said judge as to other and additional findings in said cause, among which was, in substance, the following: That there should be a finding of fact to the effect that the def't company had not selected any of the lands in controversy outside of the
376 pl'ff's six-mile limits, and that the finding of fact on that point already made was erroneous, and should be changed as suggested, and further suggested that the evidence in the case showed that the judge had clearly erred in his findings on this matter of selection of lands by the def'ts' company. That def'ts' counsel also made certain suggestions to the judge as to findings omitted and erroneously or not fully stated, and the said decision, with suggestions made as aforesaid by said counsel respectively, was returned to said judge for his final action in the premises. That afterwards, and on the 22nd day of May, 1878, said judge filed his said decision in said cause; reference thereto is hereby made as part of this affidavit.

That in said decision, as filed, said court set forth and found as facts some of the matters suggested by the said counsel as
377 aforesaid, but did not set forth or find, but declined to find or set forth in said decision said suggestions of pl'ff's counsel as to a selection of lands by def't company outside of pl'ff's six-mile limits so made to him as aforesaid, bearing the finding of fact on that point to stand as first found, and giving 30 days' time to enable either party to make a case or bill of exceptions and a stay of entry of judgment meantime.

That thereafter said def't counsel proposed a bill of exceptions in

said cause, and the same, with amendments proposed thereto by pl'ff's counsel, was duly settled, but not signed; when said pl'ff's counsel proposed a bill of exceptions in said cause, to which deponent proposed amendments; and the same was being settled before the said judge on or about August 29, 1878, when said pl'ff's counsel asked leave to apply to the court to correct the findings of fact in
said decision made in the respect set forth in his suggestions
378 in that behalf theretofore presented to said court as aforesaid,
a full statement of which application and the action of the court thereon is set forth in the second bill of exceptions allowed and settled in this cause, and to which said second bill of exceptions in said respect reference is hereby made as part of his affidavit; that thereupon said leave was granted, and a motion was made by said pl'ff's counsel, which is set forth in said second bill of exceptions, and which said motion was afterwards heard and granted by said court, and new and additional findings made and filed in said cause, dated October 15th, 1878, to which reference is hereby made.

That defendants' counsel opposed said motion preliminary and on the merits, and insisted and urged before the court that the matter had been previously passed upon by the court, and was therefore *res adjudicata*, and that no new ground or reason was
379 shown or any ground for allowing the pl'ff thus to review a
second time the said findings of fact; that deponent did not consent to said application or motion, or to the granting of the same, but resisted the same to the best of his ability; that affiant did not desire or ask said court to make additional findings of fact or law upon any matters or points whatever on said hearing, and the allusion of the court in said last decision to a suggestion made by deponent as to the omission to find certain matters in said original decision is calculated to convey an erroneous impression, and one not intended by this deponent.

That in opposing the pl'ff's said motion, and especially that part not embraced in the order of Aug. 29, 1878, deponent urged that no leave had been granted to move for a correction of findings originally made, except in one particular; that if other matters could be
brought up and new findings had thereon and a general re-
380 view of the former findings had, so far and so often as pl'ff
asked, and without leave first obtained, the def'ts could also bring up matters which they might think required review, and thus the whole case could be argued again and again; and he instanced, as matters which had been omitted in the decision then on file, the withdrawal of lands for the benefit of the defendant company in 1864, and, in answer to this, pl'ff's counsel then stated that he was willing that the court should reconsider any matter which deponent could suggest, provided only that deponent would make a written motion for that purpose, setting up specifically the matter upon which he desired the court to change or review his findings, which deponent deponent declined to do, and did not do so, but went on [with] his argument in opposition to said motion; that said reference on his part to said omission of said court was merely casual and by way

381 of argument and illustration, and was not intended to be a suggestion to the court to make a finding of fact on such matter; that the evidence touching said matter was not discussed or reviewed by either counsel, nor any argument made thereon, nor as to the effect or meaning thereof, nor as to what findings of fact said evidence would warrant in that behalf, or as to how such findings of fact would affect the law of the case, but the matter was not alluded to than as stated aforesaid; and deponent says that the action of the court in making said last-mentioned finding was a surprise to him, and that he had no idea that any such matter would be considered by the court, or that the court regarded any remarks of deponent on the hearing of the motion as a suggestion that the court should make new findings, and that in such action of the court the defendants have suffered prejudice and their substantial
382 rights been materially affected. That in consequence of said last decision deponent was obliged to present, and has presented and had settled, a second bill of exceptions, and said cause and the same has been engrossed and signed. And deponent says that, in his judgment, said proceedings of said court in the trial of said action, in granting said application to amend said complaint, in striking out said admissions of fact, in requiring said trial to proceed as if no such changes in pleadings and evidence had occurred, in granting said motion to correct said decision and make new findings without notice or argument thereon, and without imposing costs or terms of any kind upon said plaintiff, in whose favor all said rulings were made—

Were all and singular irregular, against the letter and spirit of the statute, contrary to good practice, and prejudicial to the substantial rights of these defendants.

383 That the same was unusual and unexpected, and operated as a surprise upon said defendants and their counsel against which no ordinary prudence could have guarded.

That in consequence thereof, said defendants have been placed at a disadvantage in the trial of said cause, in the preparation of evidence upon the issues as framed before entering upon said trial, in being deprived of evidence relied upon at the onset, and until the trial was nearly ended, and which formed part of the consideration of their own admissions, which they were not permitted to withdraw, and in being deprived of a large part of the lands in controversy, which the decision first made gave them, and in the filling up of said decision with a large mass of matter calculated to obscure the real issues and to place def'ts in a disadvantag*i*ous light, and
384 they have not had *had* in a legal and substantial sense that fair trial which every litigant has a right to expect.

(Signed) E. C. PALMER.

Subscribed and sworn to before me, January 7, 1879.

[SEAL.] (Signed) CHAS. N. BELL,
Notary Public, Ramsey Co., Minn.

Affidavit of Thomas Wilson in Opposition to Motion for New Trial.

District Court, Blue Earth County, State of Minnesota.

THE WINONA AND ST. PETER RAILROAD COMPANY
vs.
THE SAINTT PAUL AND SIOUX CITY RAILROAD COMPANY *et als.*

STATE OF MINNESOTA, } ss:
Faribault County, }

Thomas Wilson, having been first duly sworn, doth depose and say: That he is, and since this action was commenced has been, the plaintiff's attorney therein, having the sole charge and man-
385 agement of the case on part of the plaintiff.

That this action was commenced July 6th, 1874, and after said action was commenced an action was commenced by the above-named defendant company against the above-named plaintiff to recover from the plaintiff about fifty thousand acres of land, more or less, which suit involved the very questions involved in the above-entitled action.

That after issues joined to each and both of the aforesaid actions, and before either was moved for trial, it was agreed by the attorneys for the respective parties for each (being the attorneys in this action) that the pleadings in each might be amended without any application to or leave granted by the court for that purpose, and the pleadings in each and both of the said actions were amended accordingly by consent.

That on the second day of February, A. D. 1875, the complaint amended as aforesaid in this action was served on the de-
386 fendants' attorney, to which to the original complaint this affiant refers, and this affiant says that the amendment aforesaid was the only amendment of the complaint in this action, save and except the amendment made on the trial in 1875, as referred to hereinafter, and in the affidavit of defendants' attorney, dated January, 7, '79, and affidavit says that the amendment made in the complaint by consent as aforesaid was unimportant, and did not change essentially the issue, or make necessary any delays or the production of any evidence not required by the issue made before the amendment aforesaid, in evidence and proof of which the affidavit refers to the original and amended complaint.

That subsequently, to wit, on the 27th July, A. D. 1875, the case was brought on for trial at St. Paul, but prior thereto, and subsequent to the amendment of the complaint as aforesaid, the attorneys of the plaintiff and defendant entered into and signed the stipulations marked "A & B," referred to in the bills of exceptions herein and in the affidavit of defendants' attorney herein, dated January 7th, "A." D. 1879.

387 That said stipulations were agreed upon and entered into as follows: The attorneys for the plaintiff and defendant, respectively, met together and proposed and agreed that all facts which were conceded and agreed upon should be stipulated, so as to save the expense and trouble of adducing evidence to establish facts

which could certainly be proven and which were admitted, and it was not understood, agreed, or pretended to stipulate to any matter of facts which were not believed and conceded to be true, except that it was denied that the defendant company was legally incorporated (and affiant avers according to his best recollection that defendant's attorney claimed and pretended that the plaintiff was not legally incorporated); but it was agreed to waive any question as to the incorporation of the said companies, it being conceded and understood, as affiant believes, that that question could not be litigated or avail either party in this action.

And it was further stipulated, as a mere matter of convenience, that a certain form of authentication of certain evidence to be
388 offered should be sufficient. That after the said attorneys had agreed that they would stipulate to all facts known or conceded to be true, they called together E. F. Drake, pres. of defendant's company, and H. W. Lamberton, land commissioner of the plaintiff, who, it was conceded and understood, were more familiar with the facts in the case than any other person or persons, and they were by the attorneys particularly enquired of as to what the unquestioned facts in the case were, and all these facts pertinent to the case and which it was thus understood were unquestioned, or believed or conceded to be true, were stipulated, as aforesaid, and no fact save as to the incorporation of the companies, as aforesaid, was assented or stipulated to which it was not understood and agreed was true and probable. And said stipulations were not made or entered into on the theory or understanding that those facts stipulated by one party were the equivalent of those facts stipulated or admitted by the other, save and except that the admission without the expense or trouble of proof of matters known or conceded to be probable was, in point of fact, a benefit and convenience alike to each and both parties.

389 That when said stipulations were entered into as aforesaid the affiant believed that it was true in fact that the defendant company had built its line of road to the south line of their State.

That the affiant was led and induced to so believe by the following evidence among other evidence, viz: The president of the said defendant company, E. F. Drake, had sworn to a pleading charging and alleging that fact, and the secretary, Hamilton, of the said def't's company had also sworn to a pleading charging and alleging that fact, which pleadings were in the two suits aforesaid touching the lands aforesaid, were, or were to be, as both said president and sec. well knew, served on this affiant as attorney for the plaintiff.

That on the trial of this action the former president of the defendant company (Horace Thompson) and the present president of said company, having been examined as witness, testified and admitted that the defendant company had not constructed, completed, and extended, but on the contrary had determined not to con-
390 struct or extend its line of road beyond or west or southwest of St. James in the east line of range 32.

That on learning that he had been deceived and misled in the premises on affidavits setting out fully and particularly the facts, he applied to the court to amend his complaint in which he had admitted that the defendant company had constructed and extended its line of road to the south line of the State as aforesaid, and also to amend the stipulation aforesaid, in and by which it was stipulated and admitted (what was alleged in the complaint) that said road had been by the defendant company completed and extended to the south line of the State; that this affiant on this motion refers to the affidavits and many papers in that motion as a part hereof.

That in settling the bill of exceptions in this action the court declined to require the defendant's attorney to, but left it optional with him to incorporate said moving papers in said bill of exceptions as a part thereof, and the defendant's counsel declined to do so.

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That after the order allowing and ordering the amendment of the complaint and stipulation in the respect aforesaid (which order is herein referred to), the defendants' counsel, on affidavits, moved to vacate and set aside said Stipulation "B," on the ground and for the reasons stated and set out in the affidavits of E. F. Drake and defendants' attorney, on which the motion was based.

That this affiant, in opposition to said motion, made his affidavit, and exhibited to the court the original correspondence and memoranda kept by and passing between the parties during the negotiations and discussions, which resulted in said stipulation, and in and by said affidavit, letter, and memoranda the affiant believes he clearly and conclusively showed that the purpose gained thereby, and intention of such stipulation, were as above set out in the affidavit, and not otherwise, and to which affidavit and papers used by the plaintiff in opposition to said motion to set aside and vacate said Stipulation "B" this affiant refers as part of the papers to be used in opposition to this motion.

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And affiant further alleges and avers that, notwithstanding the said Stipulation "B," he was required to and did produce and have examined as witnesses on the trial, the chief engineer, who surveyed and definitely located the plaintiff's line of road throughout its entire length, and to have duly certified copies of the maps showing the dates and fact of location, and the land limits of said road from its eastern terminus to the west line of the State, and any fact necessary to a recovery in this cause by the plaintiff was clearly and satisfactor-ly established by competent evidence, without reference to the aid of the stipulation or provisions of said Schedule "B," and in proof of this fact, the affiant refers to the evidence in this case and to the judge's minutes to show that plaintiff established its right to recover without reference to said Schedule "B."

That this affiant refers to the moving papers for a statement of the grounds on which the order to amend the complaint and Stipulation "B" was granted, and to said order to show the nature and extent of such amendment; and affiant further says that the evidence in the case shows that that part or subdivision of the complaint and the said Schedule "B" amended as

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aforesaid was false and erroneous before said amendment, and only by said amendment made to correspond with and speak the truth, and that the evidence and findings of the court in the case clearly show that the decision or judgment in the case, or the facts found, are not varied, or in any respect affected by or changed or varied by, or liable to be varied, changed or affected by the amendments aforesaid, and that the defendants could not possibly be affected or injured by such amendments; to which order and findings the affiant refers in opposition to this motion.

That said case was tried at St. Paul as aforesaid, and the trial progressed or was adjourned or postponed from time to time, and for indefinite times, and at some times the date of next meeting
394 was not fixed or determined at the time of adjournment.

That when said amendments were allowed, or soon thereafter, the court adjourned the trial to a time not fixed, only one witness having been examined after such amendments before an adjournment; that such adjournments were had, and the times and length thereof arranged to suit the convenience of the court in the transaction of other judicial duties and the convenience of counsel.

That the adjournment aforesaid (immediately succeeding the said amendments) was not for any particular or fixed time, and when said amendments were made no time was allowed or fixed within which the defendants should serve their amendments to the complaint.

That the plaintiff's counsel was orally directed by the court to write said amendments into the complaint at the proper places and to serve a copy of the complaint, after such amendments had been inserted as aforesaid, on the defendants' counsel, and there was
395 no direct indication or understanding that the same should be verified; and the same verification of said complaint so served on defendants' attorney were made under the following circumstances, as the defendants' attorney well knew.

That the complaint, with the amendments incorporated as aforesaid, was served on the defendants' attorney, and he returned the same with a long list of objections thereto with them, and among others the objection that the same was not verified.

That thereupon a verification was written therein after and in addition to the previous verification, which was signed by H. W. Lamberton as land com'r of the defendant (plaintiff?). That the verification was written on and made solely and only to prevent, if possible, delay and quibbling over unimportant points, shown by plaintiff's attorney to have been made by defendants' attorney for the sole purpose of giving an excuse for delay.

That subsequently the defendants' counsel obtained an order to show cause why a certain subdivision (30) of the complaint
396 should not be made more definite and certain, which the affiant did not resist, but, on the contrary, stated to the court that he was willing to make it in every respect definite and certain.

That the court ordered said subdivision of the complaint to be made definite and certain, and on application of the defendants'

counsel, without opposition from the plaintiff's counsel, the defendants was in and by such order allowed 20 days within which to answer the amended complaint.

That after the plaintiff's counsel had served on the defendants' counsel the complaint with the amendments incorporated as directed as aforesaid, the defendants' counsel answered the same, &c. In and by his answer he set up new matter, and made allegations not touching or responsive to the amendments allowed to the complaint as aforesaid.

That thereafter the plaintiff's counsel obtained an order to show cause, dated January 10, '74, requiring the defendant to show
397 cause why the amendments of the answer should not be limited and confined to matters of facts alleged in the amendments of the complaint, &c.; and on the return day of said order the court, after hearing the counsel for the respective parties, ordered that certain portions of the defendants' amended answer should be striken out; to which order to show cause, and order striking out part of defendants' said amended answer, reference is hereby made, and the same will be referred to in opposition to this motion for a new trial.

That from the latter order the defendants appealed to the Supreme Court, and the order appealed from was affirmed.

That after the case had been remanded to the district court, in the year A. D. 1877, the affiant, as attorney for the pl'ff, gave notice to the defendants' attorney that he would move to proceed with and finish the trial at a certain term of the court therein designated and specified, to which motion affiant refers; and afterwards the
398 said defendant's counsel objected to the continuation of said trial, and moved that said motion be set aside, and on the hearing of said motion the court denied the same.

It having been then and there urged by the pl'ff's counsel that the court should clearly indicate of record what was the understanding and intention when the amendment of the complaint was ordered as aforesaid, and after hearing the counsel for the respective parties, the court made the following entry in its minutes, viz:

Upon convening in St. Paul, Aug. 1, 1877, defts' counsel presented motion, (filed in writing at court in Mankato, May 15, 1877,) which is denied by court, and def't excepts.

The court then directs the trial to be resumed in the following manner:

That the pl'ff shall resume the case, presenting such evidence as may be pertinent to prove the allegations made by it in the amendment (to the complaint before allowed), and when the plaintiff
399 shall rest the case as to such new issues the case will be again taken up by the defendant for the introduction of such further evidence as it may desire to present to sustain the allegations in the answer as it now stands, and when defendant shall rest, the plaintiff may rebut, as the practice is.

This order of trial is made in pursuance of what was intended by the court to be the course pursued when the trial was suspended

upon the allowance of the amendments to the complaint on or about Oct. 6, 1875.

To this order of the court defendant excepts, (claiming that the trial should be begun *de novo*).

That until long after the making of the order allowing the amendment of the complaint and Exhibit "B" as aforesaid, this affiant did not hear it claimed or pretended, and verily believes it was not understood, claimed, or pretended by the defendant's counsel that the court intended to authorize, or did authorize, the raising of new issues, except on or growing out of the new matter allowed to be incorporated into the complaint as aforesaid, and affiant verily
400 believes that that was the intention and clear understanding of the court and of the attorneys for the respective parties when said order was made.

That as to said findings, the facts are as hereinafter stated, and not otherwise, viz: When the findings were written out they were, according to previous suggestion, forwarded by the judge to the defendants' counsel for examination, and to be forwarded to the pl'ff's counsel, with the view and understanding that any suggestion of either counsel as to additional findings of fact would be considered, but without any right or authority to either counsel to suggest to the court any amendments or objections to findings made.

That when the findings were forwarded to this affiant the time consumed had been so great that affiant made merely a few hasty suggestions, but begged the court not to consider any of them if delay would thus be caused; and, according to affiant's best recollection (he has not now access to such letter, which is [in] the hands of the judge, as he believes, and he hereby refers to the same),
401 he suggested to the judge in said letter that the finding in the respect aforesaid (viz., as to the selection of lands outside of pl'ff's six-mile limits) was unsupported by any evidence, and that the evidence was all to the contrary; that while he did not feel at liberty to critisize any finding, he referred to this as a manifest oversight, but he did not refer to the evidence save as aforesaid.

That in the first finding the court having awarded to the defendants the undivided half of about 7,000 acres of the lands in controversy, the plaintiff proposed a bill of exceptions with a view to appeal from that part of the judgment to be entered in the case; and in that bill of exceptions set out all the evidence touching the selection of the said 7,000 acres of lands outside of pl'ff's six-mile limits, and asked the court to certify that that was all the evidence touching that question, and the defendants' counsel, by way of amendment to said bill of exceptions, having moved to strike out the same on the settlement, the plaintiff called attention to the evidence which had been taken by a stenographer, which clearly showed that
402 there was no evidence whatever intending to prove that the lands referred to had ever been selected for or by the defendants, but that it had been selected by the plaintiff.

That the defendants' counsel argued in favor of his amendment to strike out that part of the proposed bill of exceptions on the ground (among others) that the plaintiff's remedy and proper cause

in such case was to apply to the court to change or modify its findings in that respect, and that the court could not properly sign a bill of exceptions which contradicted its findings of facts in the case.

That the court thereupon intimated, and stated in his opinion, the proper practice was if by mistake or oversight he had, as was claimed, overlooked any evidence and thus made an erroneous ruling or finding for the plaintiff, to move to amend the finding or decision, and intimated that he considered that a proper case for such motion to amend the finding.

That the affiant then and there acquiesced and concurred in this intimation and suggestion of defendants' counsel and the court, and when the motion to amend came on to be heard he distinctly
403 stated that, unless the court would base his decision to amend (if made) on the grounds aforesaid, more fully and particularly stated and set out in the affidavit of affiant then and there presented to the court, (and not contradicted, or offered to be contradicted by any affidavits of defendants' counsel,) and which affidavit is herein referred to as a part hereof of this affidavit, asked and requested and wished that the application should be denied, and the findings left without addition or amendment.

That this affiant distinctly stated to the court that he did not deem it proper for him to review any finding by him previously made except on account of some oversight or mistake.

That he (affiant) did not deem it proper for the court, if there was any evidence to support his finding, to again weigh the evidence, and that this affiant would not consent to have the finding amended on his motion only on the ground of mistake and oversight, as aforesaid, and on the ground that that course had been suggested by the defendants' counsel and the court, as aforesaid, and affiant
404,405 says that the evidence on the trial clearly and conclusively showed that there was *no evidence tending to show* any selection, or claim or pretense of selection, of the lands in controversy by the defendant Co., or by any one for it.

This affiant further says that the defendants' counsel did suggest that the court should make additional findings as to the withdrawal of the lands along defendants' line west of range 31, but wished it done without a formal motion by him to that effect; that this affiant protested against such course, and stated to the court that if the defendants' counsel would make a formal motion to have the findings amended, or to have additional findings in that respect, that this affiant would not oppose the same; but that it was not fair to the plaintiff to permit the defendant to take the benefit of a certain practice or course and at the same time save the right to object to a similar practice on part of or in favor of the plaintiff; that notwithstanding the objection and protest of the plaintiff, the court did make additional findings in the respect last aforesaid, at the
406 instance of the defendants' counsel as aforesaid.

Affiant farther says that according to his best recollection the defendants' counsel has at no time pretended or claimed that he had or could produce any other or farther evidence tending to strengthen his defense, nor has he pretended or claimed that there

is any such evidence to be found, nor has he asked for continuance or delay to procure or seek such evidence.

And affiant farther says that it has at no time, to his best recollection and belief, been pretended or claimed by def'ts' counsel that the facts stipulated in Schedules "A" & "B" are contrary to the truth in any respect save as to the incorporation of said companies, or that the defendant was prejudiced by either or any fact or stipulation in either because it was not in accordance with the truth.

That the affidavit of def'ts' counsel, on which the motion for a new trial is to be made herein, was received at Winona on evening of the 9th inst. (having been mailed at St. Paul in the fore-
407 noon of the same day, or in the evening of the previous day, after the mail for the east had closed), and in order to reach the place at which this motion is to be heard at the time set for the hearing, it was necessary for the affiant to leave Winona, his home, on the afternoon of the 8th inst., and he has therefore been compelled to write this affidavit in great haste, and without the opportunity to refer to dates or particular form or words of previous orders or papers referred to. Affiant farther says that the evidence, record, and findings in the case clearly shows that no step taken in this case or order made to which objection is made on the motion for a new trial, or which is suggested or claimed to be a ground for a new trial on this motion, could by any possibility have prejudiced the defendants, or any of them, in view of the findings in this case.

And affiant further says that the said evidence, records, and findings herein to which reference is made, and which the affiant insist shall be considered on this motion, show, as affiant believes, that all questions or issues raised by the amendment of
408 the complaint in the trial aforesaid were and have been decided in favor of the plaintiff.

THOMAS WILSON.

Subscribed and sworn to before me, the 10th day of Jan'y, 1879.
(Signed) D. A. DICKINSON,
Judge District Court.

409 STATE OF MINNESOTA, *County of Blue Earth:*

District Court, 6th Judicial District.

THE WINONA & ST. PETER RAILROAD COMPANY
against
THE ST. PAUL & SIOUX CITY RAILROAD COMPANY *et al.*

COUNTY OF FARIBAULT, *ss:*

E. C. Palmer, being duly sworn, says: That he has just and for the first time now and hastily read the affidavit of Thomas Wilson made to oppose the motion for a new trial in said cause, and he makes this affidavit to correct and supplement the statement so far as the limited time permits set forth in said affidavit of said Wilson; and deponent says that he has not deemed it necessary to set forth

an- refer to the affidavits used on the motion for leave to amend said complaint, but inasmuch as the making of affidavits on that application have been referred to in said affidavits of said Wilson as part thereof, deponent craves leave to refer, and does hereby refer, to the affidavits of E. F. Drake and E. C. Palmer, used to oppose said application as a part hereof, and to be considered on the hear-
410 ing hereof. Deponent further says that the second action referred to in said affidavit of said Wilson was dismissed on motion of def't before the trial of this action was commenced.

Deponent further craves leave to refer, and does hereby refer, to the moving affidavits used on the motion of def't to strike out Stipulation "B," referred to in the affidavit of said Wilson as part hereof, and to be used and considered in this motion.

Deponent further says that he did not, on the hearing of pl'ff's bill of exceptions, propose or consent that pl'ff's counsel should apply for leave to move the court to make additional findings, nor say anything on the subject except by way of argument in opposing the incorporation of improper matter into said bill; that he did claim, by way of argument, that pl'ff's proper course was or would have been to make such application, and not have attempted to get such matter inserted in a bill of exceptions; but he did not suppose that in stating this ground of opposition to that feature of said bill he was suggesting or consenting that such course
411 could or might then be pursued; and he distinctly states that said plaintiff's counsel did not on said hearing intimate or declare that he looked upon defendants' remarks or such suggestion or consent, or that he made his application by reason or on account thereof. And he further states this: That said matter came before the court on the settlement of the second bill of exceptions, and the court refused to place in said bill any statement that def'ts' counsel made any suggestion or consent; that said application of pl'ff's counsel to correct said findings and said second bill states the whole truth in that regard.

(Signed) E. C. PALMER.

Subscribed and sworn to before me January 10th, 1879.

(Signed) D. A. DICKINSON,
District Judge.

412 STATE OF MINNESOTA, *County of Blue Earth:*

District Court, Sixth Judicial District.

THE WINONA & ST. PETER RAILROAD COMPANY
against
THE ST. PAUL & SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow.

The motion on the part of the defendants, The St. Paul and Sioux City Railroad Company and Charles H. Bigelow, for an order vacating and setting aside the two several decisions filed in said action,

and each of the same, to wit, the decision filed May 22, 1878, and the decision dated October 10, 1878, and for a new trial in said action having come on for hearing on the 10th day of January, 1879, which motion was made pursuant to the written notice on the part of the said defendants filed on said 10th day of January, 1879, and upon the grounds therein particularly set forth, which motion on the part of said defendants was made upon the pleadings in said action, the decisions of the court, and the two bills of ex-
413 ceptions filed therein, and upon the affidavit of E. C. Palmer, referred to in said notice, and made on the 7th day of January, 1879, and plaintiff's counsel appearing to oppose such motion, and presenting to be considered upon the hearing of such motion the affidavit made by him on said 10th day of January, 1879, and on that day filed, and to rebut matters set forth in such last-described affidavit, the counsel for defendants presenting to be also considered his further affidavit, made and filed on said 10th day of January, 1879, and such affidavits having been received by the court, and counsel for the respective parties having been heard upon such motion of the said defendants, and the court having duly considered the matters involved in such motion:

Now, therefore, it is ordered that such motion of said defendants for the order setting aside and vacating such decisions of this court in such action and granting a new trial therein be, and such motion is, denied and refused.

Dated January 11, 1879.

414 (Signed) D. A. DICKINSON,
Judge of said Court.

415 *Stipulation.*

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, 6th Judicial District.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY *et al.*

It is hereby stipulated that judgment may be entered & costs taxed in said action notwithstanding the appeal taken from the order denying a new trial; and that an appeal may be taken from said judgment upon giving the same amount of security as was fixed by the court on the appeal from said order within ten days after said entry of judgment, said costs to be taxed upon the notice heretofore served on a notice of five days; and if appeal from said taxation be taken the same shall be done forthwith and submitted to the court, and the costs as taxed be inserted in the judgment before appeal taken therefrom. That the return now being made on said appeal from said order shall stand and be taken as the return on appeal from said judgment (if the same is full and sufficient
416 to present all the questions arising on the appeal from the judgment) in connection with a return of said judgment and

proceedings or taxation of costs, so that one return shall suffice for both appeals so far as may be. But said return shall be deemed full & complete unless objection thereto be made specifying deficiencies on or before the tenth day of the next term of the supreme court, and if such objection be so made, the appellant shall cause such supplemented return to be sent up as may be ordered by the court to make said return full and complete.

And it is further stipulated that said appeals shall be brought on at the next term of the supreme court, & argued & submitted without further notice; and that the appellant shall serve papers, books, and points and authorities on or before the first day of said term, and the respondent within twenty days thereafter shall serve his points and authorities.

All proceedings on said judgment shall be stayed for ten days after entry thereof, and insertion of costs therein to enable said appellants to perfect said appeal, and said appeal and the
417 giving of said security shall, if perfected as aforesaid, operate as a stay of all proceedings on or to enforce said judgment during the pendency of said appeal in the supreme court of the State.

(Signed) E. C. PALMER,
App'lt's Att'y.
Feb'y 8th, 1879.
(Signed) THOMAS WILSON,
Respondent's Att'y.

It is stipulated that the costs may be taxed in the above action on the notice heretofore served, verified Dec. 30, 1878, and objections thereto, if any, to be filed with the clerk on Saturday, the 22 day of February, 1879, at 10 o'clock a. m., without further notice.

(Signed) THOMAS WILSON,
Pl'ff's Att'y.
Feb. 19, 1879.
(Signed) E. C. PALMER,
Att'y for Defendants.

418 *Judgment.*

District Court, Blue Earth County, State of Minnesota.

THE WINONA & ST. PETER RAILROAD COMPANY
vs.
THE ST. PAUL & SIOUX RAILROAD COMPANY, THOMAS A. SCOTT, Charles Scheffer, Charles H. Bigelow, William R. Marshall, Horace Hall, & George P. Wilson.

This cause having been regularly called & tried by the court, and the findings of fact & conclusions of law therein having been made & filed, & the decision therein in writing having been duly rendered by the court, & being now on file in this cause, wherein judgment was awarded in favor of the plaintiff against the defendants as to the greater part of the lands described in the complaint, as in and by said findings and decision fully appears, on motion of Thomas Wilson, the plaintiff's attorney, it is now therefore hereby ordered, adjudged, determined, and decreed that the plaintiff have judgment

against the defendants, as found and decided by the court as aforesaid; and that the plaintiff (The Winona & St. Peter Rail-
419 road Company) is the owner in fee-simple & entitled to receive from the Governor of this State a deed of the following described lands, being in the State of Minnesota, (being all the lands described in schedule "B," attached to the complaint in this action, excepting the northeast quarter (N. E. ¼) of section seventeen (17), township one hundred & seven (107) north, of range forty (40) west, & the undivided one-half of the south half of the south half (N. W. ¼ of S. ½ of S. ½) of section number three (3), in township numbered one hundred & seven (107) north, of range thirty-five (35) west, viz:

The north half of northeast quarter (N. ½ of N. E. ¼) and north half of northwest quarter (N ½ of N. W. ¼) of section five (5), township one hundred and seven (107) north, of range thirty-three (33) west; also north half of northwest quarter (N. ½ of N. W. ¼) of section numbered one (1) and north half of northeast quarter (N. ½ of N. E. ¼) and north half of northwest quarter (N. ½ of N. W. ¼) of section numbered three (3), and north half of northeast quarter (N. ½ of N. E. ¼), and north half of northwest quarter (N. ½ of N.
420 W. ¼) of section numbered (5), in township numbered one hundred and seven (107) north, of range thirty-four (34) west; also north half of northeast quarter (N. ½ of N. E. ¼), and north half of southwest quarter (N. ½ of S. W. ¼), and northwest quarter (N. W. ¼) of section numbered one (1), and the north half (N. ½) and the north half of southwest quarter (N. ½ of S. W. ¼), and north half of southeast quarter (N. ½ of S. E. ¼) of section numbered three (3), all of section numbered (5), and north half of northwest quarter (N. ½ of N. W. ¼), and north half of northeast quarter (N. ½ of N. E. ¼) of section numbered seven (7), and north half of northeast quarter (N. ½ of N. E. ¼) and north half of northwest quarter (N. ½ of N. W. ¼) of section numbered nine (9) in township numbered one hundred and seven (107) north, of range thirty-five (35) west; also all of sections one (1), three (3), five (5), seven (7), and nine (9), and north half of northeast quarter (N. ½ of N. E. ¼), and north half of northwest quarter (N. ½ of N. W. ¼) of section numbered eleven (11), and north half of northeast quarter (N. ½ of N. E. ¼), and north half of northwest quarter (N. ½ of N. W. ¼) of section numbered seventeen (17), in township numbered one hundred and seven (107) north,
421 of range thirty-six (36) west; also all of sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), seventeen (17), and north half of northeast quarter (N. ½ of N. E. ¼) and north half of northwest quarter (N. ½ of N. W. ¼) of section numbered thirteen (13), and north half of northeast quarter (N. ½ of N. E. ¼) and north half of northwest quarter (N. ½ of N. W. ¼) of section numbered (15), in township numbered one hundred and seven (107) north, of range thirty-seven (37) west; also northwest quarter of northwest quarter (N. W. ¼ of N. W. ¼) of section three (3), and north half of northeast quarter (N. ½ of N. E. ¼) of section seven (7), and all of section five (5), in township one hundred and seven (107) north, of range thirty-eight (38) west; also the north half (N.

½) and lot three (3) of section one (1), and the north half of northeast quarter (N. ½ of N. E. ¼) of section three (3), in township one hundred and seven (107) north, of range thirty-nine (39) west; also all of sections three (3), nine (9), seventeen (17), nineteen (19), and
southeast quarter (S. E. ¼) and west half (W. ½) of section
422 seven (7), and east half of northeast quarter (E. ½ of N. E. ¼), and southwest quarter of northeast quarter (S. W. ¼ of N. E. ¼), and northwest quarter (N. W. ¼), and east half of southwest quarter (E. ½ of S. W. ¼), and southeast quarter (S. E. ¼) of section five (5), and the north half of the northeast quarter (N. ½ of N. E. ¼), and north half of northwest quarter (N. ½ of N. W. ¼) of section twenty-nine (29), in township one hundred and eight (108) north, of range thirty-two (32) west; also all sections one (1), five (5), seven (7), nine (9), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-nine (29), thirty-one (31), and southeast quarter (S. E. ¼), and west half (W. ½) of section three (3), and north half (N. ½), and north half of southeast quarter (N. ½ of S. E. ¼), and north half of southwest quarter (N. ½ of S. W. ¼), and southwest quarter of southwest quarter (S. W. ¼ of S. W. ¼) of section eleven (11), and east half of northeast quarter (E. ½ of N. E. ¼), and southwest quarter of northeast quarter (S. W. ¼ of N. E. ¼), and southeast quarter (S. E. ¼) and west half (W. ½) of section twenty-seven (27), and southwest quarter (S. W. ¼), and south
423 half of southeast quarter (S. ½ of S. E. ¼), and northwest quarter of southeast quarter (N. W. ¼ of S. E. ¼), and southwest quarter of northwest quarter (S. W. ¼ of N. W. ¼) of section thirty-three (33), and northeast quarter (N. E. ¼) and north half of northwest quarter (N. ½ of N. W. ¼), and southeast quarter of northwest quarter (S. E. ¼ of N. W. ¼), and northwest quarter of southwest quarter (N. W. ¼ of S. W. ¼), and south half of southwest quarter (S. ½ of S. W. ¼), and southwest quarter of southeast quarter (S. W. ¼ of S. E. ¼) of section thirty-five (35), in township one hundred and eight (108) north, of range thirty-three (33) west; also all of sections nineteen (19), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), and south half (S. ½) of section numbered one (1), and south half (S. ½) of section numbered (9), and west half (W. ½) and north half of northeast quarter (N. ½ of N. E. ¼), and southwest quarter of northeast quarter (S. W. ¼ of N. E. ¼), and northwest
quarter of southeast quarter (N. W. ¼ of S. E. ¼), and south
424 half of southeast quarter (S. ½ of S. E. ¼) of section numbered thirteen (13), and east half (E. ½), and east half of northwest quarter (E. ½ of N. W. ¼), and east half of southwest quarter (E. ½ of S. W. ¼), and southwest quarter of southwest quarter (S. W. ¼ of S. W. ¼) of section numbered fifteen (15), and west half (W. ½), and northwest quarter of northeast quarter (N. W. ¼ of N. E. ¼), and south half of northeast quarter (S. ½ of N. E. ¼), and north half of southeast quarter (N. ½ of S. E. ¼) of section numbered seventeen (17), and east half (E. ½), and southwest quarter (S. W. ¼), and south half of northwest quarter (S. ½ of N. W. ¼), and northwest quarter of northwest quarter (N. W. ¼ of N. W. ¼) of

section numbered twenty-one (21), in township numbered one hundred and eight (108) north, of range thirty-four (34) west; also all of sections thirteen (13), fifteen (15), nineteen (19), twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), and south half (S ½) of section numbered seventeen (17), in town-
425 ship numbered one hundred and eight (108) north, of range thirty-five (35) west; also all of sections nineteen (19), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), and south half (S. ½) of section numbered twenty-three (23), in township numbered one hundred and eight (108) north, of range thirty-six (36) west; also all of sections twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), thirty-five (35), and south half (S. ½) of section No. twenty-one (21), in township numbered one hundred and eight (108) north, of range thirty-seven (37) west; also all of sections one (1), eleven (11), thirteen (13), fifteen (15), seventeen (17), nineteen (19), twenty-one (21), twenty-three (23), twenty-seven (27), twenty-nine (29), thirty-one (31), thirty-three (33), and east half (E. ½) and southwest quarter (S. W. ¼) of section three (3), and east half (E. ½) and southwest quarter (S. W. ¼) and east half of northwest quarter (E. ½ of N. W. ¼) of section numbered nine
426 (9), and north half (N. ½) of section numbered twenty-five (25), in township numbered one-hundred and eight (108) north, of range thirty-eight (38) west; also all of sections twenty-five (25) and thirty-five (35), and east half of northeast quarter (E. ½ of N. E. ¼), and east half of southeast quarter (E. ½ of S. E. ¼), and southwest quarter of southeast quarter (S. W. ¼ S. E. ¼), and southeast quarter of southwest quarter (S. E. ¼ of S. W. ¼) of section numbered thirteen (13), and southeast quarter (S. E. ¼), and south half of northeast quarter (S. ½ N. E. ¼) of section numbered twenty-three (23), and south half of southeast quarter (S. ½ S. E. ¼) of section numbered twenty-seven (27), and the southeast quarter (S. E. ¼) of section numbered thirty-three (33), in township numbered one hundred and eight (108) north, of range thirty-nine (39) west; also lot two (2) of section numbered twenty-three (23), and southeast quarter (¼) of southwest quarter (¼), and southeast quarter (¼) of section numbered twenty-one (21), and southwest quarter of southwest quarter (S. W. ¼ S. W. ¼), and lot three (3),
427 four (4), five (5), of section numbered twenty-five (25), and southeast quarter of northeast quarter (S. E. ¼ N. E. ¼), and west half (½) of section numbered twenty-seven (27), and west half of northeast quarter (W. ½ N. E. ¼) and southwest quarter (S. W. ¼) of section numbered thirty-one (31), and north half (N. ½) and east half of southeast quarter (E. ½ S. E. ¼), and west half of southwest quarter (W. ½ S. W. ¼) of section thirty-five (35), in township numbered one hundred and nine (109) north, of range thirty-two (32) west; also section twenty-five (25) and east half of southeast quarter (E. ½ of S. E. ¼) of section numbered twenty-seven (27), and southeast fractional quarter (S. E. ¼) of section numbered thirty-one (31), and southwest quarter (S. W. ¼) and northeast quarter (N. E. ¼)

and west half of southeast quarter (W. ½ of S. E. ¼) of section numbered thirty-three (33), & north half (N. ½) of section numbered thirty-five (35), in township numbered one hundred and nine
428 (109) north, of range thirty-three (33) west; also south half of southeast quarter (S. ½ of S. E. ¼) and south half of southwest quarter (S. ½ of S. W. ¼) of section numbered thirty-five (35), in township numbered one hundred and nine (109) north, of range thirty-eight (38) west, and the undivided half of east half of northeast quarter and of northwest quarter of the northeast quarter (Un. ½ of E. ½ of N. E. ¼ of N. W. ¼ of N. E. ¼) of section numbered seventeen (17), in township one hundred and twelve (112) north, of range twenty-seven (27) west.

Also the south half of northeast quarter (S. ½ of N. E. ¼) and northwest quarter (N. W. ¼) and south half (S. ½) of section seven (7), and north half of northwest quarter (N. ½ of N. W. ¼) of section seventeen (17), township one hundred and seven (107) north, of range thirty-eight (38) west; also the east half of northeast quarter (E. ½ of N. E. ¼) (or lots one (1) and two (2)), and northwest quarter of northeast quarter (N. W. ¼ of N. E. ¼) and north half of northwest quarter (N. ½ of N. W. ¼) and northeast quarter of south-
429 east quarter (N. E. ¼ of S. E. ¼) of section thirteen (13), in township one hundred and seven (107) north, of range forty (40) west; also lots four (4), five (5), and six (6), and northwest quarter of southwest quarter (N. W. ¼ of S. W. ¼), and south half of southwest quarter (S. ½ of S. W. ¼) of section one (1), and south half of northeast quarter (S. ½ of N. E. ¼), and southeast quarter (S. E. ¼) and west half (W. ½) of section three (3), & east half of southeast quarter (E. ½ of S. E. ¼) of section five (5), and all of sections seven (7), nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17), twenty-one (21), twenty-three (23), and north half of northeast quarter (N. ½ of N. E. ¼) of section (19), and north half (N. ½) of section twenty-seven (27), in township numbered one hundred and *and* seven (107) north, of range thirty-nine (39) west; and also the south half of southeast quarter (S. ½ of S. E. ¼) of section thirty-three, in township numbered one hundred and eight (108) north, of range thirty-nine (39) west.

2. That the plaintiff and the defendant, The St. Paul and Sioux City Railroad Company, are each the owner in fee simple and
430 entitled to a deed from the Governor of this State of the undivided one-half of the following described lands, viz: The south half of the south half (S. ½ of S. ½) of section numbered three (3), in township numbered one hundred and seven (107) north, of range thirty-five (35) west; & that the defendant, The St. Paul and Sioux City Railroad Company, is the owner in fee simple and entitled to a deed from the Governor of the State of the entire northeast quarter (N. E. ¼) of section seventeen (17), township one hundred and seven (107) north, of range forty (40) west.

3. That none of the defendants have any right, title, interest, or estate in or to any of the lands aforesaid, or to any part or parcel thereof, except that the defendant, The St. Paul and Sioux City Railroad Company, owns in fee simple and is entitled to a deed from the Governor of this State of the undivided one-half of the south half

of the south half (Un. $\frac{1}{2}$ of S. $\frac{1}{2}$ of S. $\frac{1}{2}$) of section numbered three (3), in township numbered one hundred and seven (107)
431 north, of range thirty-five (35) west, and owns in fee simple and is entitled to a deed from the Governor of this State of the entire northeast quarter (N. E. $\frac{1}{4}$) of section seventeen (17), township one hundred and seven (107) north, of range forty (40) west.

4. That all adverse claims of the defendants, and of each of them, and of all persons claiming or to claim said premises, or any part thereof, through or under said defendants, or either of them, are invalid and groundless, (except the claim of the defendant, The St. Paul and Sioux City Railroad Company, and those claiming under it, to the undivided one-half of the south half of the south half (Un. $\frac{1}{2}$ of S. $\frac{1}{2}$ of S. $\frac{1}{2}$) of section three (3), in township one hundred and seven (107) north, of range thirty-five (35) west, and to the entire northeast quarter (N. E. $\frac{1}{4}$) of section seventeen (17), in township one hundred and seven (107) north, of range (40) forty west); and that the plaintiff is the sole, true, and lawful owner of each and every tract and parcel of all the lands aforesaid, (except the undivided
432 one-half of the south half of the south half (Un. $\frac{1}{2}$ of S. $\frac{1}{2}$ of S. $\frac{1}{2}$) of section three (3), township one hundred and seven (107) north, of range thirty-five (35) west, and the entire northeast quarter of section seventeen, township one hundred and seven north, of range forty (40) west); and that the plaintiff's title to each and every tract and parcel of said land, with the exception aforesaid, is hereby adjudged to be quieted against all claims, demands, and pretences of the defendants, or each or any of them, who are hereby perpetually estopped from setting up any claim thereto, or to any part thereof.

5. That the defendant, The St. Paul and Sioux City Railroad Company, its officers, agents, and servants, should be, and it and they are hereby, enjoined and forever restrained from applying for or receiving, or accepting from the Governor of this State a deed or conveyance of any part or parcel of said above-described lands, or any estate or interest in the same, or in part or parcel thereof, except the undivided one-half of the south half of the south half
433 (Un. $\frac{1}{2}$ of S. $\frac{1}{2}$ of S. $\frac{1}{2}$) of section three (3), township one hundred and seven (107) north, of range thirty-five (35) west, and the entire northeast quarter of section seventeen (17), township one hundred and seven (107) north, of range forty (40) west, as aforesaid.

And it is further ordered, adjudged, determined, and decreed that an injunction issue out of this court in this action against the defendant, the St. Paul and Sioux City Railroad Company, perpetually and forever enjoining and restraining it, (the said St. Paul and Sioux City Railroad Company,) its officers, agents, and servants, and each, every, and any of them, from applying for or receiving or accepting from the Governor of this State a deed or conveyance of any tract or parcel of the above-described lands, or of any interest in any tract or parcel thereof, except the undivided one-half of the south half of the south half (Un. $\frac{1}{2}$ of S. $\frac{1}{2}$ of S. $\frac{1}{2}$) of section three (3), township one hundred and seven (107) north, of range (35) thirty-five west, and the entire northeast quarter (N. E. $\frac{1}{4}$) of sec-

434 tion seventeen (17), township one hundred and seven (107) north, of range forty (40) west.

And it is further ordered, adjudged, and decreed that the plaintiff recover of the defendant, The St. Paul and Sioux City Railroad Company, its costs and disbursements in this action, to be taxed by the clerk of this court on proper motion and application, and to be inserted in this judgment upon and after such taxation, and that said judgment be docketed, and in default of the payment thereof, that the plaintiff have execution therefor.

Said costs and disbursements as taxed amount to the sum of five hundred and ninety-one & $\frac{30}{100}$ dollars ($591.30).

And it is further adjudged and decreed that as to the defendants, Thomas A. Scott, William R. Marshall, and Horace Hall, the complaint herein be, and the same is, dismissed without costs or disbursements as to them.

(Signed) D. A. DICKINSON,
Judge of District Court, Sixth Judical District, State of Minnesota.

435 Signed and entered, this 25th day of February, A. D. 1879, at 3 o'clock p. m.

(Signed) WILLIAM C. DURKEE,
Clerk District Court, Blue Earth County, Minn.

Notice of Appeal. From July Next.

436 STATE OF MINNESOTA, } *ss*:
County of Blue Earth, }

District Court, 6th Judicial District.

THE WINONA & ST. PETER RAILROAD COMPANY, Pl'ff,
against
THE ST. PAUL & SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, Charles Scheffer, William R. Marshall, Horace Hall, Geo. P. Wilson, and Charles H. Bigelow, Defendants.

To Thomas Wilson, attorney for the above-named plaintiff, and W. C. Durkee, clerk of said district court:

Please to take notice that the above-named St. Paul & Sioux City Railroad Company & Charles H. Bigelow appeal to the supreme court of the State of Minnesota from the judgment of the said district court, entered herein, and docketed in the office of the clerk of said clerk of said court on the 25th day of February, 1879, in favor of the said Winona and St. Peter Railroad Company, and against the said St. Paul & Sioux City Railroad Company and Charles H. Bigelow, defendants, and adjudging the title to certain lands therein described to be in said pl'ff, and perpetually enjoining said defendants in respect to said lands, and awarding costs against said

437 defendants as taxed & inserted therein.

(Signed) E. C. PALMER,
Att'y for said Railroad Company and C. H. Bigelow.

438 *Bond on Appeal.*

STATE OF MINNESOTA, *County of Blue Earth:*

District Court, 6th Judicial District.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY Thomas A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow.

Know all men by these presents, that The St. Paul & Sioux City Railroad Company, as principal, are held and firmly bound unto the Winona & St. Peter Railroad Company, plaintiff in the above entitled action, in the sum of fifteen thousand dollars lawful money of the United States, to be paid unto the said Winona and St. Peter Railroad Company its successors or assigns, for which payment well and truly to be made, we bind ourselves, our successors, heirs, executors, and administration, firmly by these presents.

Sealed with our seals, and dated this 3d day of March, A. D. 1879.

The condition of this obligations is such as whereas the said
439 St. Paul and Sioux City Railroad Company, and Charles H. Bigelow, appeal to the supreme court of the State of Minnesota from the judgment of the said district court, entered on the 25th day of February, A. D. 1879, in favor of said plaintiff and against said appellants in the above entitled action, adjudging the title to certain lands in said judgment described to be in said plaintiff, and perpetually enjoining said defendants in respect to said lands and awarding costs against said defendants as taxed and inserted therein:

Now, therefore, if the said appellant shall pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment is affirmed if the judgment appealed from, or any part thereof, is affirmed, and shall pay all damages which are awarded against the said appellant upon the appeal, and all costs and charges which may be awarded against them on the appeal then this obligation shall be void, otherwise of force.

(Signed) THE ST. PAUL & SIOUX CITY RAILROAD COMPANY.
J. W. BISHOPS, [SEAL.]
Gen'l Manager.
G. A. HAMILTON, *Sec.* [SEAL.]
440 JOHN S. PRINCE. [SEAL.]

Signed, sealed, & delivered in presence of—
E. C. PALMER,
CHAS. A. BELL.

STATE OF MINNESOTA, }
County of Rams-y, } *ss:*

Be it known that on this 4th day of March, A. D. 1879, before me personally appeared J. W. Bishop, Horace Thompson, and John S

Prince, each to me known to be the same persons described in and who executed the foregoing bond, and, each for himself, acknowledged the same to be his own free act and deed; and said Bishop, as the general manager of said railroad company, acknowledged the same to be the free act and deed of said company.

[SEAL.] (Signed) CHARLES A. BELL,
Notary Public, Ramsey Co., Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Horace Thompson & John S. Prince, the sureties named in and who executed the foregoing bond, being first duly sworn, doth, each for himself, depose and say: That he is a resident and freeholder of the State of Minnesota and worth the amount of fifteen thousand dollars above his debts and liabilities and exclusive of his property exempt from execution.

441 (Signed) JOHN S. PRINCE.
(") HORACE THOMPSON.

Subscribed and sworn to before me, this 4th day of March, A. D. 1879.

[SEAL.] (Signed) CHAS. A. BELL,
Notary Public, Ramsey Co., Minn.

The within bond, in the sum and with the sureties therein appearing, is, in the absence of the judge, hereby approved, this 5th day of March, A. D. 1879.

(Signed) WM. C. DURKEE,
Clerk District Court.

442 STATE OF MINNESOTA, *Blue Earth County:*

OFFICE OF CLERK OF DISTRICT COURT.

I, Wm. C. Durkee, clerk of the district court in and for said county and State, hereby certify that I have carefully compared the foregoing copies with the original files and records in the action therein entitled, and that the same [is] a true and correct transcripts therefrom, as appears from said originals, which remain on file and of record in my office, and of the whole thereof.

That this return consists of copies of the last amended complaint (except the description of lands which is contained in the judgment), the answer thereto, first and second decision of the court, first and second bills of exceptions, notice of motion for new trial, and affidavits of E. C. Palmer and Thomas Wilson used upon said motion, order denying motion, notice of appeal from such order, bond on appeal, stipulation for judgment and appeal, notice of taxation of costs and affidavit of Thomas Wilson thereon, objections to taxations & rulings of clerk, order of court on appeal from tax-
443 ation, judgment and bond on appeal from judgment, and the original map, "Ex. A," filed with the original complaint herein.

Witness my hand and seal of office at Mankato this 26th day of March, A. D. 1879.

Fees on return $97.43.

WILLIAM C. DURKEE,
Clerk Dist. Court.

444 *Appeal from Order and Judgment.*

State of Minnesota, Supreme Court, Blue Earth County.

THE WINONA AND ST. PETER RAILROAD COMPANY, Respondent,
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants.

Thomas Wilson, Att'y for Resp't. E. C. Palmer, Att'y for App't.

Will the clerk please file this note of issue, and enter the cause on the calendar for the April term, A. D. 1879.

Yours, &c.,

E. C. PALMER AND M. J. SEVERANCE,
Attorneys for Appellants.

Endorsed: Note of issue. Filed March 25th, 1879. Sam. H. Nichols, clerk.

445 State of Minnesota, Supreme Court. General April Term, A. D. 1879.

WEDNESDAY MORNING, 9½ O'CLOCK,
May 14th, A. D. 1879.

Court convened pursuant to adjournment; all the justices being present.

THE WINONA & SAINT PETER RAILROAD COMPANY, Respondent,
[*vs.*]
THE SAINT PAUL & SIOUX CITY RAILROAD COMPANY, Thomas A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow, Appellants. } No. 82. 2636.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel for the respective parties, submitted to the court for its decision, and taken under advisement.

A true record.

Attest: SAM. H. NICHOLS, *Clerk.*

The foregoing is a full and true copy of the minutes of
446 argument in the above-entitled cause.

Attest: SAM. H. NICHOLS, *Clerk.*

Endorsed: Filed Sept. 13th, A. D. 1880. Sam. H. Nichols, clerk.

447 *Syllabus.*

Supreme Court. April Term, 1879.

THE WINONA AND SAINT PETER RAILROAD COMPANY, Respondent,
vs.
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants.

Orders and rulings of the court below not prejudicial to the merits of the case disregarded.

The second section of the act of Congress of March 3, 1865, entitled "An act extending the time for the completion of certain railroads in the States of Minnesota and Iowa, and for other purposes," relates only to the lands granted by that act.

Both railroad companies claim under the grant by the act of Congress of March 3, 1857, entitled "An act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in
448 the construction of a certain railroad in said State," and the defendant company claims part of the lands under a Congressional grant of 1864.

The line of defendant was located through the territory where the lands in controversy lie in 1859, the line of plaintiff in 1866. No valid selection of lands for indemnity purposes was made till 1872, when defendant first selected the lands in controversy for such purposes and they were certified by the Secretary of the Interior to the State for defendant's line.

Held, That the lands within the six-miles limits of plaintiff and between the six and the fifteen-miles limits of defendant belong to plaintiff.

The lands lying between plaintiff's six-miles and fifteen-miles limits and between defendant's fifteen-miles and twenty-miles limits belong to plaintiff. The lands lying between the six-miles and fifteen-miles limits of each company belong to both companies in common.

Judgment affirmed.

449 *Opinion.*

Supreme Court. April Term, 1879.

THE WINONA & ST. PETER RAILROAD COMPANY, Respondent,
vs.
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants.

The appellants makes a great many exceptions to orders and rulings of the court below on matters of practice, or upon evidence offered at the trial.

We see none that affect the material facts of the case, and as it is evident that these orders and rulings did not prejudice the appellants in any way, we pass over them and come to the merits.

Defendant claims that the act of March 3, 1865, increasing the grant for the lines mentioned in the act of March 3, 1857, from six to ten sections per mile also changed that act so that no land can become attached to the grant until it shall be indicated for the
450 particular line by the Secretary of the Interior, and that as none of these lands have been so indicated for the plaintiff's line, none of them have become subject to its grant.

We think Sec. 2 of the act of 1865, which is claimed to have this effect, relates only to the selection of lands granted by that act, and was not intended to take away the company's right to ascertain and identify the lands granted by the act of 1857, in the mode in that act prescribed.

The lands in controversy were all certified by the Secretary of the Interior for the line of the defendant.

The defendant's line was located through the territory where the lands in controversy lie in 1859, the plaintiff's in 1868. Until 1872 there was no selection of indemnity lands through this territory on behalf of either line.

They were then selected first on behalf of defendant's line. What is claimed as a selection in 1858 had no validity, for it does not appear ever to have been communicated or known to or
451 approved or acted on as a selection by the Secretary of the Interior.

As found by the court below, the lands in controversy may, for the decision of the case, be divided into four classes:

First. Those lying without the six but within the fifteen-miles limits of defendant and within the six-miles limits of plaintiff.

Second. Those lying without the six-miles limits of each company, within the fifteen-miles limits of plaintiff, and without the fifteen but within the twenty-miles limits of defendant.

Third. The south half of the south half of sec. 3, town. 107, range 35, which lies without the six but within the fifteen-miles limits of each line.

Fourth. The northeast quarter of sec. 17, town. 107, range 40, which lies without the fifteen-miles limits of each line, but within the twenty-miles limits of defendant's line.

As to the first of these classes, to wit, the lands within
452 plaintiff's six-miles limits, the members of the court are agreed in the result, to wit, that plaintiff is entited to them, but arrive at such result upon diverse reasons.

As to the second class, plaintiff's claim to them under the grant of 1857 is superior to defendant's claim under the grant of 1864, and it has no other claim to them, and the plaintiff is entitled to them.

As to the third class, the majority of the court are of opinion that the rights of the plaintiff and defendant are equal, and they are entitled to hold the land in that class in common.

As to the land in the fourth class, the defendant is entitled to it.

The result is as to all accords with the decision of the court below.

GILFILLAN.

(Indorsed:) Opinion and syllabus. Filed August 27th, 1880. Sam. A. Nichols, clerk.

453 State of Minnesota, Supreme Court. April Term, A. D. 1879.

THE WINONA AND SAINT PETER RAILROAD COMPANY, Respondent,
vs.
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants. } No. 82.

Appeal from district court, sixth judicial district, county of Blue Earth.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1879, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered August 27th, A. D. 1880.

BY THE COURT.

Attest: SAM. H. NICHOLS, *Clerk.*

454 I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: [SEAL.] SAM. H. NICHOLS, *Clerk.*

Endorsed: Filed September 13th, A. D. 1880. Sam. H. Nichols, clerk.

State of Minnesota, Supreme Court. April Term, A. D. 1879.

THE WINONA AND SAINT PETER RAILROAD COMPANY, Respondent,
vs.
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants. } No. 82.

Pursuant to an order of court, duly made and entered in this cause on the twenty-seventh day of August, A. D. 1880:

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district
455 court of the sixth judicial district, sitting within and for the county of Blue Earth, be, and the same hereby is, in all thing saffirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said The Saint Paul and Sioux City Railroad Company and Charles H. Bigelow, appellants herein, the sum and amount of one hundred and ten dollars ($110), costs

and disbursements in this cause in this court, and that said respondent have execution for the enforcement hereof.

Dated and signed this thirteenth day of September, 1880.

BY THE COURT.

Attest: SAM. H. NICHOLS, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Printer's fees for printing briefs, $45.00, and printing briefs on reargument, $28.00	73 00
Clerk's fees, Supreme Court	12 00
	$110 00

456 STATE OF MINNESOTA, *ss:*

Supreme Court.

I, Sam. H. Nichols, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of Saint Paul, this 13th day of September, A. D. 1880.

[SEAL.] SAM. H. NICHOLS, *Clerk.*

Endorsed: Filed September 13th, A. D. 1880. Sam. H. Nichols, clerk. No. 2636. State of Minnesota supreme court. The
457 Winona and St. Peter Railroad Company, respondent, *vs.* The Saint Paul and Sioux City Railroad Company and Charles H. Bigelow, appellants. Judgment roll.

Endorsed: Filed September 13th, 1880. Sam. H. Nichols, clerk. Thomas Wilson, attorney for respondent.

State of Minnesota Supreme Court. General April Term, A. D. 1880.

THURSDAY MORNING, 9.30 O'CLOCK, *April 15th*, A. D. 1880.

Court convened pursuant to adjournment.

All the justices being present.

THE WINONA AND ST. PETER RAILROAD COMPANY, Respondent.
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants. } No. 7. 2636.

This cause came on to be heard this day upon the reargument of the cause herein.

Thereupon the same was argued by counsel for the re-
458 spective parties, and pending said argument court adjourned.

A true record.
Attest: SAM. H. NICHOLS, *Clerk.*

The foregoing is full and true copy of the minutes of argument in the above-entitled cause.
Attest: [SEAL.] SAM. H. NICHOLS, *Clerk.*

Endorsed: Filed Nov. 8th, A. D. 1880. Sam. H. Nichols, clerk.

State of Minnesota, Supreme Court. General April Term, A. D. 1880.

FRIDAY MORNING, 9.30 O'CLOCK, *April 16th*, A. D. 1880.

Court convened pursuant to adjournment.
All the justices being present.

THE WINONA AND ST. PETER RAILROAD COMPANY, Respondent,
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY *et al.*, Appellants. } No. 7. 2636.

Counsel for the respective parties resumed their argument
459 in the cause herein submitted to the court for decision and taken under advisement.

A true record.
Attest: SAM. H. NICHOLS, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.
Attest: [SEAL.] SAM. H. NICHOLS, *Clerk.*

Endorsed: Filed Nov. 8th, A. D. 1880. Sam. H. Nichols, clerk.

460 State of Minnesota Supreme Court. General October Term, A. D. 1880.

TUESDAY, 12 O'CLOCK M. *October 5th, A. D.* 1880.

Court convened pursuant to adjournment.
All the justices being present.

THE WINONA AND ST. PETER RAILROAD COMPANY, Respondents.
vs.
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants. } No. 82. 2636.

This cause came on to be heard this day, and it is here and hereby ordered that the order of the court below herein appealed from

be, and the same hereby is, in all things affirmed, and that the respondent have judgment accordingly.

A true record.
Attest: [SEAL.] SAM. H. NICHOLS, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.
461 Attest: SAM. H. NICHOLS, *Clerk.*

Endorsed: Filed Nov. 8th, A. D. 1880. Sam. H. Nichols, clerk.

State of Minnesota Supreme Court. October Term, A. D. 1880. On Calendar April Term, A. D. 1880.

THE WINONA AND ST. PETER RAILROAD COMPANY, Respondent,
vs.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants.
No. 82. 2636.

Appeal from district court, sixth judicial district, county of Blue Earth.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1879, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below herein appealed from be, and the same hereby is, in all things affirmed, and
462 that the respondent above named have judgment accordingly.

Entered October 5th, A. D. 1880.

BY THE COURT.

Attest: SAM. H. NICHOLS, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.
Attest: [SEAL.] SAM. H. NICHOLS, *Clerk.*

Endorsed: Filed Nov. 8th, A. D. 1880. Sam. H. Nichols, clerk.

State of Minnesota Supreme Court. October Term, A. D. 1880. On Calendar April Term, A. D. 1879.

THE WINONA AND ST. PETER RAILROAD COMPANY, Respondent,
vs.
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY and CHARLES H. BIGELOW, Appellants.
No. 82.

Pursuant to an order of court duly made and entered in this cause, on the fifth day of October, A. D. 1880—
463 It is here and hereby determined and adjudged that the order of the court below, herein appealed from, to wit, of the dis-

trict court of the sixth judicial district, sitting within and for the county of Blue Earth, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent ent above named do have and recover of said The Saint Paul and Sioux City Railroad Company and Charles H. Bigelow, appellants herein, the sum and amount of thirty-two dollars and fifty cents ($32.50) costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement hereof.

Dated and signed, this eighth day of November, 1880.

BY THE COURT.

Attest: SAM. H. NICHOLS, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees supreme court	7 50
	$32 50

State of Minnesota Supreme Court.

464 I, Sam. H. Nichols, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the Capitol in the city of Saint Paul, this eighth day of November. A. D. 1880.

[SEAL.] SAM. NICHOLS, *Clerk.*

Endorsed: Filed Nov. 8th, A. D. 1880. Sam. H. Nichols, clerk. No. 2636. State of Minnesota, supreme court. The Winona and St. Peter Railroad Company, respondent, against The Saint Paul
465 and Sioux City Railroad Company *et al.*, appellants. Judgment-roll.

Endorsed: Filed November 8th, 1880. Sam. H. Nichols, clerk. Thomas Wilson, attorney for respondent.

466 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Winona and St. Peter Railroad Company and the St. Paul and Sioux City Railroad Company, Thomas Scott, Charles Scheffer, William R. Marshall, Horace Hall,

George P. Wilson, and Charles H. Bigelow, wherein was drawn in question the construction of three several statutes of the United States, and the final decision and judgment was against the title, right, privilege, and exemption specially set up and claimed under such statutes, and each and every of the same, a manifest error hath happened, to the great damage of the said St. Paul and Sioux City Railroad Company, Thomas A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow, as by their answer appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the
467 same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the eleventh day of November, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

Received and filed this 11th day of November, A. D. 1880.
SAM. H. NICHOLS,
Clerk of Supreme Court, Minnesota.

468 STATE OF MINNESOTA, *ss:*

Supreme Court.

THE WINONA AND SAINT PETER RAILROAD COMPANY
against
THE SAINT PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow.

To the Honorable James Gilfillan, chief justice of said court:

The petition of the St. Paul & Sioux City Railroad Company, Thomas A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow states: That in the above-entitled action there was drawn in question in this court the construction of three several statutes of the United States, and that the final decision and judgment of this court was against the title, right, privilege, and exemption specially set up and claimed
469 by your petitioner under such statutes, and each and every of the same.

Wherefore your petitioners pray that your honor will examine the record of this court in that behalf, and allow to your petitioners a

writ of error, in order that the said judgment and record may be brought before the Supreme Court of the United States.

E. C. PALMER,
Attorney for said Petitioners.

The writ of error hereinbefore prayed is hereby allowed.

Done at the October term of the supreme court of the State of Minnesota, and on November 9th, 1880.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

Endorsed: Filed November 11th, 1880. Sam. H. Nichols, clerk.

470 STATE OF MINNESOTA:

Supreme Court.

THE WINONA AND ST. PETER RAILROAD COMPANY
against
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THOMAS A. SCOTT, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow.

Know all men by these presents that the St. Paul and Sioux City Railroad Company, a corporation duly organized and existing under the laws of Minnesota, and Elias F. Drake and Amherst H. Wilder, of the county of Ramsey, in the State of Minnesota, are held and firmly bound unto the Winona and St. Peter Railroad Company in the sum of one thousand dollars, to be paid to the said obligee, its successors or assigns; to which payment, well and truly to be made, the said St. Paul and Sioux City Railroad Company binds
471 itself, its successors and assigns, and the said Elias F. Drake and Amherst H. Wilder bind themselves, jointly and severally, and their and each of their heirs, executors, and administrators, firmly by these presents.

Sealed with their seals, and dated this 28th day of October, A. D. 1880.

Whereas the above-bounden St. Paul and Sioux City Railroad Company and the other defendants above named have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the supreme court of the State of Minnesota: Now, therefore, the condition of this obligation is such that if the above-named St. Paul and Sioux City Railroad Company and Thomas A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow shall prosecute this writ of error to effect,
472 and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE ST. PAUL & SIOUX CITY RAILROAD COMPANY,
By E. F. DRAKE, *Vice-President.*
GEORGE A. HAMILTON, *Secretary.*
[SEAL.]
E. F. DRAKE. [SEAL.]
A. H. WILDER. [SEAL.]

Executed in our presence:
J. F. DEVLIN.
E. C. PALMER.

STATE OF MINNESOTA, } ss.:
County of Ramsey, }

On this 28th day of October, A. D. 1880, personally appeared before me, Elias F. Drake, vice-president, and George A. Hamilton, secretary of the St. Paul & Sioux City Railroad Company, to me known to be the vice-president and secretary thereof, and the same persons who executed the foregoing instrument, and they acknowledged the same to be the act and deed of said company, and that they
473 affixed the seal of said corporation thereunto by authority of said company, and severally acknowledged that they executed the same as the act and deed of said corporation for the uses and purposes therein expressed; and on said 28th day of October, A. D. 1880, personally came before me, Elias F. Drake and Amherst H. Wilder, to me known to be the same persons who executed the foregoing instrument, and severally acknowledged that they executed the same freely and voluntarily for the uses and purposes therein expressed.

[SEAL.] J. F. DEVLIN,
Notary Public, Ramsey Co., Minn.

STATE OF MINNESOTA, } ss.:
County of Ramsey, }

Elias F. Drake and Amherst H. Wilder came before me personsonally, and being by me first duly sworn, doth say, each for himself, that he is the surety above named; that he is a resident
474 and freeholder in the county of Ramsey and State of Minnesota, and worth the amount of one thousand dollars specified in the foregoing bond, above his debts and liabilities, and exclusive of his property which is exempt from taxation.

E. F. DRAKE.
A. H. WILDER.

Subscribed and sworn to before me, this 28th day of October, A. D. 1880.

[SEAL.] J. F. DEVLIN,
Notary Public, Ramsey Co., Minn.

I hereby approve the foregoing bond and surieties.

JAMES GILFILLAN,
Nov. 9th, 1880. *Chief Justice Supreme Court, Minnesota.*

Endorsed: Filed November 11th, 1880. Sam. H. Nichols, clerk.

475 Supreme Court, State of Minnesota.

United States of America to the Winona and St. Peter Railroad Company:

You are hereby cited and admonished to be and appear at a Supereme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1881, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Saint Paul and Sioux City Railroad Company, Thomas A. Scott, Charles Scheffer, William R. Marshall, Horace Hall, George P. Wilson, and Charles H. Bigelow, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Gilfillan, chief justice of the supreme court of Minnesota, this 9th of November, A. D. 1880.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

476 STATE OF MINNESOTA, *County of Winona:*

I, William H. Dill, sheriff of Winona county, State of Minnesota, do hereby certify that at Winona, in said county and State, I served the within citation upon Thomas Wilson, attorney for the defendants in error herein, on the 8th day of January, 1881, by delivering to and leaving with him personally a true and correct copy thereof. I further certify that at said Winona, on the 22d day of January, 1881, I served the within citation upon S. Sanborn, superintendent of the Winona and St. Peter R. R. Company, by delivering to and leaving with him personally a true and correct copy thereof.

WM. H. DILL, *Sheriff.*

STATE OF MINNESOTA, *County of Winona:*

477 Thomas Simpson, being sworn, says that he is an attorney-at-law, residing and having a law office at Winona, in said county and State; that on the 23d day of November, A. D. 1880, he served the following citation on Thomas Wilson, the attorney of record for the defendant in error in the cause in said citation entitled, by then and there handing to and leaving with W. A. Allen, then the general managing clerk of said Wilson, in his office at said Winona, a true copy of the same; that thereafter said Wilson, who was tempora-lly absent at the time of said service, had personal knowledge of said citation, and of the service thereof, as aforesaid, and said copy has not been returned.

THOMAS SIMPSON.

Subscribed and sworn to before me, this 24th day of December, 1880.

FRED. S. BELLS,
Notary Public, Winona County, Minn.